84-1356

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CASE NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1985

THE KOHN BEVERAGE COMPANY

Petitioner

vs.

TEAMSTERS LOCAL NO. 348, et al

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

I. The Court of Appeals erred in determining that the Collective Bargaining Agreement between Kohn and Teamster's Local 348 required payment of contributions for employees who were refused membership into the union where the contract contained a union shop clause and Kohn employees were denied entrance into the union.

II. The Court of Appeals erred in failing to apply principles of estoppel against the Local 348 Health & Welfare Fund and the Central States Pension Fund. The evidence clearly supported the elements of an estoppel defense against the Trustees of the employee benefit plans from recovering delinquent contributions.

PARTIES:

Pursuant to Rule 34.1(b), Rules of the Supreme Court, the parties to this action are listed below:

Petitioner, The Kohn Beverage Company
1065 Jenkins Blvd.
Akron, OH 44306
(216) 724-1233

Respondents, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 348
272 W. Market Street
Akron, OH 44303
(216) 434-3424

Central States Southeast and Southwest Areas Pension Fund
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TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Kohn Beverage Company, Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Sixth Circuit Court of Appeals entered in the above-captioned case on November 26, 1984.

OPINIONS BELOW

The opinion of the United States Sixth Circuit Court of Appeals is reported at 749 F. 2d 315 and is printed in Appendix "A" hereto, infra, page 1. The judgment of the United States District Court for the Northern District of Ohio was unpublished and is printed in Appendix "A" hereto, infra, page 12.

JURISDICTION

Petitioner respectfully invokes the jurisdiction of this court pursuant to the provisions of 28 U.S.C. §1254(1). The judgment of the United States Sixth Circuit Court of Appeals (Appendix A, infra. page 1), was entered on November 26, 1984. No petition for rehearing was filed.

STATEMENT OF THE CASE

On September 1, 1981, twenty-nine (29) employees of the Kohn Beverage Company (Kohn) engaged in an illegal and unauthorized wildcat strike in violation of a contractual "No Strike" clause of a Collective Bargaining Agreement entered into between Teamsters Local 348, and Kohn. Thereafter, on September 3, 1981, the striking employees were terminated by Kohn and replaced by non-union employees.

In addition to the "No Strike" clause contained in the Collective Bargaining Agreement between Kohn and Teamsters Local 348, the Collective Bargaining Agreement required that Kohn contribute for each employee to the Teamster's Local 348 Health and Welfare Fund and the Central States Southeast

and Southwest Areas Pension Fund (Central States). Also contained in the Collective Bargaining Agreement was a union shop clause mandating that all employees join the local union within 31 days of being employed and remain members.

In accordance with the union shop clause of the Collective Bargaining Agreement, the non-union employees sought to join the local union after working for a period of thirty-one (31) days. However, when the non-union employees attempted to join the union they were denied membership by Local 348 by Secretary-Treasurer Dan Darrow. Darrow, who in addition was trustee and administrator of the Local 348 Health and Welfare Fund, also informed the employees that they would not be eligible for benefits from the health

and welfare or pension funds. Consequently, Kohn subsequently provided alternative health and pension benefits to the non-union employees. Kohn continued to make contributions to the funds for union members whose employment was not terminated.

On October 26, 1982, the Health and Welfare Fund filed a Complaint pursuant to 29 U.S.C. §§185(a), 1132(a), and 1145 alleging violation of the Collective Bargaining Agreement and failure by Kohn to contribute to the employee benefit plans. The Plaintiffs sought to enjoin violations of the Collective Bargaining Agreement and benefit plans and to recover unpaid contributions, interest, costs and attorney fees. After trial on March 10, 1983, the District Court filed Findings of Fact and Conclusions of Law granting

EDITOR'S NOTE

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judgment for Kohn. (See Appendix "A" infra at 12). The District Court held that Kohn pursuant to the terms of the Collective Bargaining Agreement, was not required to contribute to the funds for non-union employees, and that, even if Kohn were required to contribute, Plaintiffs were estopped by Darrow's statements to the new employees from recovering the delinquent contributions.

The Plaintiffs appealed the Decision of the District Court to the United States Sixth Circuit Court of Appeals, which on November 26, 1984, issued an opinion reversing the Decision of the District Court. Specifically, the Court of Appeals held that the Collective Bargaining Agreement required contributions for each employee covered by the Collective Bargaining Agreement whether or not they were union members.

In addition, the Court of Appeals determined that the District Court erred in applying the principles of estoppel to prohibit the local union and Central States from recovering delinquent contributions. Without deciding whether estoppel may be asserted against a trustee the Court determined that the evidence was insufficient to establish reasonable reliance on behalf of Kohn Beverage, and accordingly reversed the decision of the District Court. (See Appendix "A" infra at 9). It is the Decision of the Court of Appeals rendered on November 26, 1984, for which Kohn presently seeks review through a writ of certiorari to the United States Supreme Court. In support of a grant of a writ of certiorari Kohn asserts that the Decision of the Court of Appeals "has so far departed from the accepted

and usual course of judicial proceedings. . .as to call for an exercise of this Court's power of supervision." Rule 17.1(a) Rules of the Supreme Court. In addition Kohn alleges that the Decision of the Court of Appeals has determined "an important issue of federal law which has not been, but should be settled by [the Supreme Court]." Rule 17.1(c) Rules of the Supreme Court.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals erred in determining that the Collective Bargaining Agreement between Kohn and Teamster's Local 348 required payment of contributions for employees who were refused membership into the union where the contract contained a union shop clause and Kohn employees were denied entrance into the union.

On February 20, 1981, Kohn and Teamster's Local 348 executed a Collective Bargaining Agreement for the period June 1, 1980, until May 31, 1983, providing in pertinent part:

> Article I:
>
> The employer recognizes the Union as the sole and exclusive bargaining agent on behalf of all Employers, as hereinafter defined in Article II, with respect to wages, hours, and all other terms or conditions of employment.
>
> Article II: Employees Defined-Extent of Bargaining Unit
>
> The term 'Employees', as used in this Agreement, shall include Driver-Salesmen, Special Drivers,

Swing Drivers, Over-the-Road Drivers, Helpers and Warehousemen, Garage Mechanics and Garage Maintenance employees.

Article VI: Union Shop Clause

It shall be a condition of employment that all employees of the Employers covered by this Agreement, who are members of the Union in good standing on the effective date of this Agreement, shall remain members in good standing by the payment of membership dues and those who are not members on the effective date of this Agreement shall, on the thirty-first (31) day following the effective date of this Agreement, become and remain members in good standing in the Union by payment of membership dues. It shall also be a condition of employment that all employees covered by this Agreement and hired on or after its effective date shall on the thirty-first (31) day following the beginning of such employment, become and remain members in good standing in the Union by payment of membership dues.

Article XIV: Health and Welfare

The Employers agree to contribute to the Teamsters Local No. 348 Health and Welfare Fund the following amounts for each employee covered by this Agreement:

Effective January 1, 1981, and January 1, 1982, and January 1, 1983, a sum not to exceed a maximum to ten percent (10%) increase in monthly contributions it being understood that effective January 1, 1980, the sum of One Hundred Eighty-Five Dollars ($185.00) per month is the contribution figure which is presently being made by the Employer to the Teamsters Local 348 Health and Welfare Fund for each individual affected employee.

The Employer shall continue to pay contributions for employees for a period of three (3) months if the employee is absent because of illness or off-the-job injury or layoff. The Employer shall continue to pay contributions for a period of six (6) months if the employee is absent because of an on-the-job injury.

The Employer shall remit all contributions by the 10th day of each month for that month. Late contributions shall be subject to a 10% late charge.

Benefits shall be covered in a booklet attached and shall be amended and updated from time to time subject to the provisions of the Trust Agreement and applicable law.

Retirees shall be covered by the Health and Welfare Program from

age 57 to 65.

The Employer further agrees to deduct, at the option of the employee, Ten Dollars ($10.00) per month for each employee for a supplemental policy to cover an additional Fifty Dollars ($50.00) benefit per week for sickness or accident (non-occupational) plus Ten Thousand Dollars ($10,000.00) additional life insurance.

Regular part time employees shall be covered by Health and Welfare if they are not covered by another plan.

Article XVII: Pension

Effective June 1, 1980, the Employer shall contribute to the Central States, Southeast and Southwest Areas Pension Fund the sum of Forty-six Dollars ($46.00) per week for each regular employee covered by this Agreement.

Effective June 1, 1981, the Employer shall increase said contribution to Fifty-One Dollars ($51.00) per week for each regular employee covered by this Agreement.

Effective June 1, 1982, the Employer shall continue to pay the sum of Fifty-one ($51.00) per week as contribution to said fund for each regular employee covered by this Agreement plus any

> increase in contributions as same are negotiated in the National Freight Agreement."

In light of the foregoing provisions the Collective Bargaining Agreement required Kohn to contribute to the Health & Welfare Fund "for each employee covered by this Agreement," Article XIV., and to the Central States Pension Fund "for each regular employee covered by this Agreement, Article XVII. Article II. of the Agreement provided that:

> "The term 'Employees', as used in this Agreement, shall include Driver-Salesmen, Special Drivers, Swing Drivers, Over-the-Road Drivers, Helpers and Warehousemen, Garage Mechanics and Garage Maintenance employees."

The Agreement also included a recognition clause and a union shop clause.

The District Court after trial concluded that the Collective Bargaining

Agreement between the parties, did not require the payment of funds to the Local Health and Welfare Fund or the Central States Pension Fund for employees who were not also union members. (See Appendix at page 32.) The District Court determined that although Article II. of the Collective Bargaining Agreement defined employee by job classification, a union shop clause required that all employees join and remain members in good standing of the Local Union as a condition of employment at Kohn Beverage. Article VI.

The District Court, reviewing the Collective Bargaining Agreement in its entirety, found that the union shop clause, requiring as a condition of employment that all employees of the employer covered by the Agreement become members of the union within thirty-one

(31) days of being hired, further delineated the term "employee" as used in Articles XIV. and XVII. of the Collective Bargaining Agreement.

The Court of Appeals, however, reversed the Decision of the District Court on the basis of its prior ruling in Central States v. Central Transport, 698 F. 2d 802, 805 (6th Cir. 1983), cert. granted,_____U.S._____, 104 S. Ct. 3531 1984), in which the Court held that a definition of employees by job classification required coverage by the Collective Bargaining Agreement of all employees within those classifications, regardless of union membership. In Central Transport, supra, 805 the Sixth Circuit noted:

> "Transport is a signatory to the National Master Freight Agreement, and/or supplemental, individual agreements to which the union is a party. The Collective

> Bargaining Agreements require that Transport make payments to the funds on behalf of employees covered by the Collective Bargaining Agreements, an employee is covered by the Collective Agreement if engaged in a job classification described in the National Master Freight Agreement, and/or supplements. Union membership is a prerequisite to coverage so that both union and non-union employees are covered if their job classification is so described. These employees are eligible for pension, health and welfare benefits from the funds."

Accordingly, in Central Transport, supra. the Sixth Circuit Court of Appeals determined that job classification controls under the Collective Bargaining Agreement and not union membership. In the present action, the Sixth Circuit Court of Appeals cited its opinion in Central Transport and further noted:

> "Further, to construe the term 'employees' to mean union members would render the language

> of the union shop clause surplusage. The union shop clause required that 'all employees covered by this agreement. . . become and remain members in good standing in the union. . .'." This language suggests that 'employees covered by this Agreement' may exist prior to and apart from the union member employees. The District Court interpreted the term 'employees' to mean 'union member employees'. This construction effectively interprets the union shop clause require union members to become union members, and renders the clause meaningless. 'A contract will not be construed so as to reject any words as surplusage if they reasonably can be given meaning.'" [Cite omitted].

Kohn asserts that the Court of Appeals' determination that the union shop clause had no bearing on the definition of the term "employee" as used throughout the Collective Bargaining Agreement was erroneous. The Collective Bargaining Agreement requires benefit payments to be made "for each employee covered by this agreement". As

union membership is also a basic condition of this contract, one must conclude that employees "covered by this agreement" must be union members to qualify for the benefit programs. In a close shop agreement as in the present case, union membership is strictly required as a condition of employment and consequently union membership is coincident with the term "employee".

The record evidence in this case reveals that Kohn Beverage terminated all the union employees after their refusal to return to work in violation of the Collective Bargaining Agreement. Thereafter, Kohn employed individuals to replace the discharged union employees, which members were subsequently denied the opportunity to join the union or submit their union dues. Clearly, under the terms of the Collective Bargaining

Agreement applicable to the parties the new, non-union employees could not have been employed pursuant to the Collective Bargaining Agreement in existence between the parties as such agreement required union membership. Central States failed to provide any cases where a company was required to make pension and health and welfare payments on behalf of non-union members when the employees were denied entrance into the union. Although several inferior Courts have determined that a union shop clause has no effect upon the definition of employees used in a Collective Bargaining Agreement, this Court has never availed itself of the opportunity to render such an opinion. See Audit Services, Inc. vs. Rolfson, 641 F. 2d, 757 (9th Cir. 1981); Manning vs. Wiscombe, 498 F. 2d 1311 (10th Cir.

1974); Markt vs. Ro-Mart, Inc., 471 F. Supp. 1292 (N.D. Cal. 1979).

The above-cited cases, relied upon by the Circuit Court in arriving at its determination that contributions to the funds were required on behalf of non-union employees, are inapposite to the factual circumstances surrounding the present action. In Audit Services, Inc., v. Rolfson, supra, the trust agreement expressly provided for non-union employee contributions to the pension fund. Similarly, in Markt vs. Ro-Mart, supra, the Collective Bargaining Agreement and the trust agreement provided for contributions on behalf of both union and non-union employees. Finally, in Manning v. Wiscombe, supra, the employer operated under an open shop policy employing both union and non-union employees, and

consequently the Court held that contributions were required on behalf of both union and non-union employees.

As aforenoted, in a closed shop situation, pursuant to a union shop clause, union membership inherently further defines the term "employee". The present case provides the Supreme Court with the opportunity to review this important issue concerning contract interpretation in regard to labor relations, and union shop clauses contained in collective bargaining agreements. Due to the widespread nature of collective bargaining agreements and the utilization of union shop clauses in such agreements, direction from the Supreme Court in this area would significantly further the interest of labor relations and pension benefit plans.

II. The Court of Appeals erred in failing to apply principles of estoppel against the Local 348 Health & Welfare fund and the Central States Pension Fund. The evidence clearly supported the elements of an estoppel defense against the Trustees of employee benefit plans from recovering delinquent contributions.

The District Court held, alternatively, that the Plaintiffs were estopped from seeking payment of the delinquent contributions as a result of Dan Darrow's refusal to allow the newly hired Kohn employees to join the union or to participate in either the Local 348 Health and Welfare Fund or the Central States Pension Fund. The District Court premised its holding that the Plaintiffs were estopped from seeking delinquent contributions on the basis that Darrow was acting with apparent authority on behalf of both the Local Health and Welfare Fund and the

Central States Pension Fund when he denied the new Kohn employees entry into the union or into the benefit funds.

The evidence submitted at trial revealed that Dan Darrow had been a trustee of the Local Health and Welfare fund for a period of twenty (20) years. Additionally, Darrow had been the Administrator for the Local Health and Welfare fund for approximately fifteen (15) years. Darrow had the duty to supervise the administration of the fund, the negotiating of the contribution rates into the contracts, collecting the funds and supervising the payment of claims. (See Appendix, infra. at 27). As for the Central States Pension Fund, although Darrow was not a trustee or an employee of the pension plan, he was the only person with whom Kohn Beverage had dealt with respect to

the plan. Darrow negotiated the pension plan into the Collective Bargaining Agreement, collected funds for the pension plan, and assisted employees in their application for membership in the plan and provided information about the plan to local members. Mr. Darrow at trial identified himself as a liason between the employees and Central States. Additionally, Mr. Darrow originally initiated the present action on behalf of Central States against Kohn.

Based upon the foregoing, the District Court found that Darrow was acting with apparent authority on behalf of both the Local Health and Welfare Fund and the Central States Pension Plan and that Kohn reasonably relied upon Darrow's assertions that the new employees would not be covered under the existing health and welfare fund or the

pension plan in creating an alternative health and welfare and pension plan for its non-union employees.

On appeal, the Sixth Circuit reversed the District Court and without deciding whether estoppel was an available defense against an employee benefit fund determined that Kohn failed to establish the necessary elements in support of a claim of estoppel. (See Appendix, infra. at 6). Specifically, the Court of Appeals held that Kohn failed to reasonably rely upon the statements of Darrow as it had either actual or constructive knowledge of its obligations under the plan to contribute to the fund. The Court held that while it may be reasonable for an employee union member to believe that a union representative has authority to act on behalf of the fund, Scheuer vs.

Central States Pension Fund, 394 F. Supp. 193, 196 (E.D. Wis. 1975), aff'd. 570 F. 2d 347 (7th Cir. 1977), reliance by an employer, with knowledge of the plan, on the statements of a union representative is unreasonable. The Court of Appeals noted that Article IV., Section 4.2 of the Amended Agreement and Declaration of Trust of Teamsters Local 348 Health & Welfare Fund provided that:

> "The trustees shall have full authority to determine requirements with which an individual must comply in order to be eligible for benefits and to determine all the terms and conditions of eligibility of employers for the purpose of this trust. . . "

Likewise, the revised and Amended Trust Agreement for Central States Pension Fund, Article II, Section X. provided:

> "No individual or person may act as agent for the fund unless specifically authorized in writing by the trustees. No employee

> or union, or any representative of any employer or union, in such a capacity, is authorized to interpret the plan, nor can any such person act as agent of the trustees. Only the Board of Trustees, the pension payment committee, or the pension payment appeals committee are authorized to interpret the plan within the scope of their respective authorities."

The Court of Appeals went on to note that Kohn as a party to these plans, knew or had a means of determining the truth of Darrow's statements. Further, because both plans indicated that Darrow was acting outside his authority, Kohn could not reasonably rely on Darrow's statements.

As a general rule, in pension eligibility cases, the vast majority of the Courts refused to apply estoppel principles against Taft-Hartley Pension Plans. In Reiherzer vs. Shannon, 581 F.

2d 1266 (7th Cir. 1970), the Seventh Circuit Court of Appeals held:

> "We have serious doubts, however, as to the advisability of employing estoppel principles in determining whether an individual received benefits from an employer-funded union pension plan. The vast majority of Courts considering this issue have rejected the use of estoppel principles in cases of this sort. Thurber vs. Western Conference of Teamsters Pension Plan, 542 F. 2d 1106-1108-09 (9th Cir. 1976) (proc.); Phillips vs. Kennedy, 542 F. 2d 52-55 n.a. (dictum); Moglia vs. Geoghegan, 402 F. 2d 110, 117-18 (2nd Cir. 1968), cert. denied 394 U.S. 919 89 S.Ct. 1193, 22 L. Ed. 2d 453 (1969); Chamberlain vs. Bakery Confectionary Union and Industry International Pension Fund, No. C-76-784-CBR (N.D. Cal. October 3, 1977); Hodges vs. Central States Southeast and Southwest Areas Pension Fund, 94 L.R.R.M. 2507 (E.D. Mich. 1976); Melang vs. I.V.E.W. Pacific Coast Pension Fund, 93 L.R.R.M. 2389 (W.D. Wash. 1976); Dohrer vs. Wakeman, 14 Wash. App. 157, 539 P. 2d 91 (1975). But see Scheuer vs. Central States Pension Fund, 358 F. Supp. 1332 (E.D. Wis. 1973)."

As noted in Phillips vs. Kennedy,

supra, the primary reason for refusing to apply estoppel principles against pension funds is that:

> "The actuarial soundness of pension funds, is absent extraordinary circumstances too important to permit trustees to obligate the fund to pay pensions to persons not entitled to them under the express terms of the pension plan. . ."

Although a number of Courts have declined to apply principles of estoppel against pension funds the general disinclination to apply such principles is not universal. In Rosen vs. Hotel & Restaurant Emp., etc., 637 F. 2d 592 (3d Cir. 1981) Reh'g. denied (1981) the Third Circuit applied estoppel principles against a pension fund. See also Scheuer vs. Central States Pension Fund, 358 F. Supp. 1332 (E.D. Wis. 1973); Hodgins vs. Central States, 624 F. 2d 760 (6th Cir. 1980) (Jones

dissenting). Moreover, the Court in Rosen in addressing an issue similar to that in the present action on whether the Plaintiffs reliance is reasonable, the Court at 597(n).7 noted:

> "Defendants argued that Rosen's reliance on Civatte's statements in acceptance of the check in 1971 was unwarranted because, Civatte was only one of the four trustees administering the funds and hence he did not have the actual authority to make decisions for the plan. We reject this argument. In 1971, Civatte was Secretary of the trustees for the Trust Fund in this position created the apparent, if not the actual authority to act on the trust's behalf hence Rosen's reliance on Civatte's representations was reasonable."

The Court of Appeals in the present case ignored the Findings of Fact made by the District Court, and instead substituted its own judgment. The District Court specifically found

that Darrow acted with apparent authority on behalf of the Local Health & Welfare Fund and also on behalf of Central States Pension Fund. The evidence revealed that Darrow was one of four trustees of the Local Health & Welfare Plan and in addition was the administrator of the Plan and had been for a number of years. Clearly, Kohn's reliance upon the representations made by Darrow in regards to the the Local Health & Welfare Fund was reasonable. See Rosen at 597n.7. Although the Court of Appeals attempted to premise its decision upon the language contained in the Trust Agreements, the evidence clearly revealed that Kohn's reliance was reasonable and that principles of estoppel should be asserted against the Local Health & Welfare Fund.

In addition, the evidence submitted to the Trial Court revealed that Darrow acted with apparent authority on behalf of the Central States Pension Plan. The Circuit Court totally disgarded the District Court's Findings of Fact and instead substituted its own judgment as to what was reasonable, and totally avoided the question of whether or not principles of estoppel could be applied against the Health & Welfare and Pension Funds.

Moreover, the authority relied upon by the Court of Appeals in support of its conclusion is inapplicable to the present factual situation. In support of its holding that Kohn failed to establish the requisite elements of estoppel, the Court of Appeals relied upon Knoll v. Phoenix Steel Corp., 465 F. 2d 1128 (3rd Cir. 1972), cert.

denied, 409 U.S. 1126 (1973); Audit Services, Inc., v. Rolfson, supra, Galvez vs. Local 804 Welfare Trust Fund, 543 F. Supp. 316 (E.D. N.Y. 1982); and Employer-Teamsters Joint Council No. 84, Health and Welfare Fund v. Weatherall Concrete, Inc., 468 F. Supp. 1167 (S.D. W. Va. 1979).

In Knoll vs. Phoenix, the Court held that the employees could not reasonably rely upon statements of a union official concerning pension benefits where the authority in regard to such benefits rested solely with the pensions retirement board. In the case sub judice, however, Darrow was not only a union official but also acted in the capacity of Trustee and Administrator of the Local Union Health and Welfare Fund. Accordingly, the decision in Knoll is inapplicable and the Third Circuit's

decision in Rosen, supra. is more persuasive under the present factual circumstances. Similarly, the Court of Appeals relied upon Galvez, supra. in support of its decision in favor of the Local Union and Central States. In Galvez the District Court held that the plaintiff failed to establish that a union business agent acted with any express, implied or apparent authority on behalf of a benefit plan. The record in the instant action, however, clearly and unequivocally supported the District Court's determination that Darrow acted with apparent authority on behlaf of both the Local Union and Central States.

In addition, the Court of Appeals relied upon Audit, supra. and Weatherall, supra. in support of its decision. In Weatherall, the District Court held that an employer could not

assert the defense of estoppel against the trustees of a pension fund for delinquent contributions where the employer had submitted payments below the amount specified in the Collective Bargaining Agreement as the agreement unambiguously set forth the required contributions. The Court in Audit relied upon the decision in Weatherall in determining that the Collective Bargaining Agreement unambiguously called for the payment of contributions on behalf of non-union employees to the pension fund.

In the case sub judice, Darrow, acting with apparent authority on behalf of both the Local Union and Central States refused to allow Kohn's new non-union employees to join the union or participate in the benefit funds. Darrow refused to accept contributions

on behalf of the employees and further failed to submit any billings to Kohn for the new non-union employees.

Consequently, as set forth above, the authority relied upon by the Court of Appeals is inapposite to the present case. The District Court correctly determined that Kohn established the requisite elements of estoppel, based upon the evidence submitted at trial and appropriately applied the doctrine of estoppel against the Local Health and Welfare Fund and the Central States Pension Plan.

Research does not disclose any decision by the Supreme Court regarding whether or not principles of estoppel may be applied against pension or health and welfare funds. As aforenoted, the Circuit Courts have split on the issue of whether or not estoppel may be

applied against such funds. Clearly, there is much confusion and uncertainty about whether and in what circumstances estoppel should be applied against health and welfare and pension funds. Clearly, the present case presents the Court with the opportunity to address such issues and more fully define the appropriate relation between employers in the plans.

CONCLUSION

Accordingly, the Petitioner, Kohn, requests that this Honorable Court grant this Petition for Writ of Certiorari to decide an important question of Federal law which has not been, but should be settled by this Court, and in addition to correct the decision of the Sixth Circuit Court of Appeals which has so far departed from accepted and usual course of judicial proceedings that this Court may exercise its power of supervision, and in addition, render a decision in regard to an area in which the Circuit Courts of Appeal have arrived at conflicting decisions.

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CERTIFICATE OF SERVICE

A copy of the foregoing was sent by regular U.S. Mail Service this 22nd day of February, 1985, to William B. Gore, Attorney for Respondent, Teamsters Local 348 Health and Welfare Fund, 503 Centran Building, Akron, OH 44308, and Bernard S. Goldfarb and Mark V. Webber, Attorneys for Respondent, Central States, Eighteen Hundred, 55 Public Square, Cleveland, OH 44113.

Harry A. Tipping
Attorney for Petitioner

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24
749 F.2d 315

Nos. 83-3663 & 83-3672

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TEAMSTER'S LOCAL 348 HEALTH AND WELFARE FUND, et al.

Plaintiffs-Appellants,

v.

KOHN BEVERAGE COMPANY,

Defendant-Appellee.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed November 26, 1984

Before: MARTIN and CONTIE, Circuit Judges; and PECK, Senior Circuit Judge.

CONTIE, Circuit Judge. Plaintiffs Teamster's Local 348 Health and Welfare Fund and Central States Southeast and Southwest Areas Pension Fund appeal a district court order granting judgment for defendant, Kohn Beverage Co., in this action brought pursuant to the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1381, and 29 U.S.C. § 185(a). We reverse.

I.

On February 20, 1981, Kohn and Teamster's Local 348 executed a collective bargaining agreement which provided that Kohn must contribute for each employee to the Teamster's Local 348 Health and Welfare Fund and Central States Southeast and Southwest Areas Pension Fund. On September 1, 1981, twenty-nine Kohn employees staged a work stoppage, and, on September 3, twenty-seven employees were terminated and subsequently replaced by non-union employees. Three discharged employees were reinstated after arbitration. When the non-union employees attempted to join the union pursuant to the union shop clause in the collective bargaining agreement, they were denied membership by Local 348 Secretary-Treasurer Dan Darrow. Darrow, who was trustee and administrator of the Health and Welfare Fund, told the employees that they would not be eligible for benefits from the Health and Welfare or Pension Funds. Kohn subsequently provided alternative health and pension benefits to the non-union employees.

On October 26, 1982, the Health and Welfare Fund filed a complaint pursuant to 29 U.S.C. §§ 185(a), 1132(a), 1145 alleging violation of the collective bargaining agreement and failure by Kohn to contribute to the employee benefit plans.[1] The plaintiffs sought to enjoin violations of the collective bargaining agreement and benefit plans and to recover unpaid contributions, interest, costs and attorney fees. After trial on March 10, 1983, the district court filed findings of fact and conclusions of law granting judgment for Kohn. The district court held that Kohn was not required to contribute to the funds for non-union employees and that, even if Kohn were required to contribute, plaintiffs were estopped by Darrow's

[1] Central States first learned it had been named a plaintiff in the case on January 4, 1983, and, after petitioning the court, filed an amended complaint on March 4, 1983, alleging essentially the same allegations as the original complaint.

statements to the new employees from recovering the delinquent contributions. Additionally, the district court held that Kohn was entitled to a credit for payments made to the Health and Welfare Fund in late August 1981 for the employees terminated September 3. Plaintiffs appeal.[2]

II.

Plaintiffs contend that the district court erred in construing the collective bargaining agreement and benefit plans to require Kohn to contribute to the plans for union members only. The construction of collective bargaining agreements and employee benefit plans is a question of law fully reviewable by this court. *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 698 F.2d 802, 805 (6th Cir. 1983), *cert. granted*, —— U.S. ——, 104 S. Ct.

[2] The respective trust agreements define, by reference, Kohn's obligation to contribute to the trusts in terms of Kohn's obligations under the collective bargaining agreement. Therefore, the inquiry relative to both the LMRA claims and ERISA claims is identical, and jurisdiction is appropriately premised on 29 U.S.C. § 185(a). *See Laborers Health and Welfare Trust Fund* v. *Kaufman & Broad of Northern California*, 707 F.2d 412, 416 n.4 (9th Cir. 1983). The district court apparently made no determination as to whether plaintiffs properly brought this action "on behalf of their members," nor whether plaintiffs were "participants," "beneficiaries," or "fiduciaries" within the purview of 29 U.S.C. §§ 1002(7), (8), (21), 1132(a), (e). Whether plaintiffs properly state claims cognizable under ERISA was not raised by the parties and has no effect on our determination of issues raised in this appeal; therefore, we express no opinion as to whether plaintiffs properly state a claim pursuant to 29 U.S.C. § 1132(a). *See Pressroom Unions-Printers League Income Security Fund* v. *Continental Assurance Co.*, 700 F.2d 889 (2d Cir.), *cert. denied*, —— U.S. ——, 104 S. Ct. 148 (1983); *Local 807 Labor-Management Pension Fund* v. *Owens Trucking, Inc.*, 585 F. Supp. 616 (E.D. N.Y. 1984); *Sixty-Five Security Plan* v. *Blue Cross and Blue Shield of Greater New York*, 583 F. Supp. 380, 383 (S.D. N.Y. 1984); *Margaret Hall Foundation, Inc.* v. *Atlantic Financial Management, Inc.*, 572 F. Supp. 1475, 1485 (D. Mass. 1983); *Employees Savings Plan of Mobil Oil Corporation* v. *Vickery*, 99 F.R.D. 138, 140-41 (S.D. N.Y. 1983); *Rosenthal* v. *Ann Service Corp.*, 571 F. Supp. 1229, 1230 n.1 (S.D. N.Y. 1983); *Amalgamated Industrial Union Local 44-A Health and Welfare Fund* v. *Webb*, 562 F. Supp. 185 (N.D. Ill. 1983). However, *see Fentron Industries, Inc.* v. *National Shopmen Pension Fund*, 674 F.2d 1300, 1305 (9th Cir. 1982).

3531 (1984); *Mackey* v. *National Football League*, 543 F.2d 606, 612 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

The collective bargaining agreement required Kohn to contribute to the Health and Welfare Fund "for each employee covered by this Agreement," Article XIV, and to the Pension Fund "for each regular employee covered by this Agreement," Article XVII. Article II of the agreement provided that "[t]he term 'Employees', as used in this Agreement shall include Driver-Salesmen, Special Drivers, Swing Drivers, Over-the-Road Drivers, Helpers and Warehousemen, Garage Mechanics and Garage Maintenance employees." The agreement included a recognition clause and a union shop clause.[3]

Several factors guide a determination of the scope of coverage of a collective bargaining agreement. This court has construed a definition of employees by job classification to require coverage by the collective bargaining agreement of all employees within those classifications, regardless of union membership. *Central States* v. *Central Transport*, 698 F.2d at 804-05. The presence in the agreement of a recognition clause designating the union as the exclusive bargaining

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[3] Article I provided:

> The employer recognizes the Union as the sole and exclusive bargaining agent on behalf of all employees of the Employers, as hereinafter defined in Article II, with respect to wages, hours, and all other terms or conditions of employment.

Article VI provided:

> It shall be a condition of employment that all employees of the Employers covered by this Agreement, who are members of the Union in good standing on the effective date of this Agreement, shall remain members in good standing by the payment of membership dues and those who are not members on the effective date of this Agreement shall, on the thirty-first (31) day following the effective date of this Agreement, become and remain members in good standing in the Union by payment of membership dues. It shall also be a condition of employment that all employees covered by this Agreement and hired on or after its effective date shall on the thirty-first (31) day following the beginning of such employment, become and remain members in good standing in the Union by payment of membership dues.

agent for all employees indicates that fringe benefit contributions are required for both union and non-union members. *Audit Services, Inc.* v. *Rolfson*, 641 F.2d 757, 761 (9th Cir. 1981); *Manning* v. *Wiscombe*, 498 F.2d 1311, 1313 (10th Cir. 1974). The absence of language distinguishing union and non-union employees indicates that the agreement covers all employees. *Carpenters and Millwrights Health Benefit Trust Fund* v. *Gardineer Dry Walling Co.*, 573 F.2d 1172, 1177 (10th Cir. 1978). *See Cincinnati Bengals, Inc.* v. *Thompson*, 553 F. Supp. 1011, 1014 (S.D. Ohio 1983).

The district court based its interpretation of the agreement on the presence of the union shop clause. However, union shop clauses have been construed to require only payment of union dues and not union membership. *NLRB* v. *Hershey Foods Corp.*, 513 F.2d 1083, 1085-86 (9th Cir. 1975); *Markt* v. *Ro-Mart, Inc.*, 471 F. Supp. 1292, 1296 (N.D. Cal. 1979). *See NLRB* v. *Gold Standard Enterprises, Inc.*, 679 F.2d 673, 677 (7th Cir. 1982). *See also Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665 (1982). Further, to construe the term "employees" to mean union members would render the language of the union shop clause surplusage. The union shop clause required "that all employees covered by this agreement . . . become and remain members in good standing in the Union. . . ." This language suggests that "employees covered by this agreement" may exist prior to and apart from union-member employees. The district court interpreted the term "employees" to mean "union-member employees." This construction effectively interprets the union shop clause to require union members to become union members, and renders the clause meaningless. "A contract will not be construed so as to reject any words as surplusage if they reasonably can be given meaning." *Union Investment Company* v. *Fidelity & Deposit Company of Maryland*, 549 F.2d 1107, 1110 (6th Cir. 1977).

The district court erred in interpreting the agreement as applying only to union members. The agreement recognized

the union as the bargaining agent for all employees and defined the term "employees" by job classification and not union membership.[4] The agreement required contributions "for each employee covered by this agreement." The union shop clause indicates that the class of employees "covered by this agreement" is not necessarily coincident with the class of union-member employees. Further, the district court found that union and non-union members were treated identically in regard to wages, hours and conditions of employment. Accordingly, the district court erred in holding that the presence of the union shop clause alone limited Kohn's obligation to make contributions on behalf of union members.

III.

The district court held, alternatively, that plaintiffs were estopped from seeking payment of the delinquent contributions by Dan Darrow's refusal to allow the newly hired Kohn employees to join the union. Whether facts proven are legally sufficient to constitute an estoppel is a question of law fully reviewable by this court. *Prize Steak Products, Inc.* v. *Bally's Tom Foolery, Inc.*, 717 F.2d 367, 370 (7th Cir. 1983). However, because determinations concerning the specific elements of estoppel are questions of fact, *Shamrock Development Co.* v. *City of Concord*, 656 F.2d 1380, 1386 (9th Cir. 1981), the district court's factual findings must be upheld unless clearly erroneous.

Without deciding that estoppel is an available defense against employee benefit funds, it is clear that Kohn did not establish the elements of estoppel.[5] Estoppel requires

[4] ERISA, consistent with our decision, provides that "[t]he term 'employee' means any individual employed by an employer." 29 U.S.C. § 1002(6).

[5] In actions arising under federal statutes, federal common law, rather than state law, controls with respect to the availability of

a representation, to a party without knowledge of the facts and without the means to ascertain them, upon which the party asserting the estoppel justifiably relies in good faith to his detriment. *See Johnson* v. *Williford*, 682 F.2d 868, 872 (9th Cir. 1982); *Junker* v. *Crory*, 650 F.2d 1349, 1357 (5th Cir. 1981); *NLRB* v. *J. D. Industrial Insulation Company, Inc.*, 615 F.2d 1289, 1294 (10th Cir. 1980); *Gibson* v. *International Harvester Co.*, 557 F. Supp. 1000, 1003 (W.D. Tenn. 1983); *Minnesota Mining and Manufacturing Company* v. *Blume*, 533 F. Supp. 493, 517 (S.D. Ohio 1978), *aff'd*, 684 F.2d 1166 (6th Cir. 1982), *cert. denied*, — U.S. —, 103 S. Ct. 1449 (1983).

The estoppel defense fails because Kohn had knowledge about the plans and its obligations thereunder, and did not reasonably rely on Darrow's representations. The reliance of a party seeking to assert estoppel must be reasonable. *Chambless* v. *Masters, Mates & Pilots Pension Plan*, 571 F. Supp. 1430, 1452 (S.D. N.Y. 1983). While it may be reasonable for an employee and union member to believe that a union representative has authority to act on behalf of the fund, *Scheuer* v. *Central States Pension Fund*, 394 F. Supp. 193, 196 (E.D. Wis. 1975), *aff'd*, 570 F.2d 347 (7th Cir. 1977), reliance by an employer, with knowledge of the plan, on the statements of a union representative is unreasonable. *Audit Services, Inc.* v. *Rolfson*, 641 F.2d at 762 (funds not estopped from seeking delinquent contributions where employer was not ignorant of his responsibilities under the collective bargaining agreement); *Martin* v. *Hamil*, 608 F.2d 725, 730 n.8 (7th Cir. 1979) (employer, fully aware of provisions of collective bargaining agree-

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the estoppel defense. *Audit Services, Inc.* v. *Rolfson*, 641 F.2d at 762; *Aitken* v. *IP & GCU-Employer Retirement Fund*, 604 F.2d 1261, 1264 (9th Cir. 1979). We have previously declined to decide whether estoppel may be asserted against a trustee where the estoppel argument was meritless. *Van Gunten* v. *Central States, Southeast and Southwest Areas Pension Fund*, 672 F.2d 586, 589 (6th Cir. 1982). We decline to express an opinion on an issue not necessary to disposition of the case before us.

ment, could not reasonably rely on contrary advice from union business agent); *Employer-Teamsters Joint Council No. 84, Health and Welfare Fund* v. *Weatherall Concrete, Inc.*, 468 F. Supp. 1167, 1170 (S.D. W. Va. 1979) (employer with possession of collective bargaining agreement and constructive knowledge of its terms is precluded from asserting estoppel as a defense to an action by the trustee).

Article IV, Section 4.2 of the Amended Agreement and Declaration of Trust of Teamster's Local 348 Health and Welfare Fund provided that "[t]he trustees shall have full authority to determine the requirements with which an individual must comply in order to be eligible for benefits and to determine all of the terms and conditions of eligibility of Employees for the purpose of this Trust. . . ." Likewise the Revised and Amended Trust Agreement for the Central States Pension Fund, Article II, Section 10 provided:

> No individual or person may act as agent for the Fund unless specifically authorized in writing by the Trustees. No Employee or Union nor any representative of any Employer or Union, in such capacity, is authorized to interpret the Plan, nor can any such person act as agent of the Trustees. Only the Board of Trustees, the Pension Payment Committee or the Pension Payment Appeals Committee are authorized to interpret the Plan within the scope of their respective authorities.

Kohn, as a party to these plans, knew or had a means of determining the truth of Darrow's statements. Further, because both plans indicate that Darrow was acting outside his authority, Kohn could not reasonably rely on Darrow's statements. *Knoll* v. *Phoenix Steel Corp.*, 465 F.2d 1128, 1132 (3d Cir. 1972), *cert. denied*, 409 U.S. 1126 (1973) (employees unreasonably relied on union official's statements about pension payments where authority to determine the use of pension fund rested solely with retirement board and where pension fund agreement provided that decision of the board would be

conclusive and binding); *Chambless* v. *Masters, Mates & Pilots Pension Plan*, 571 F. Supp. 1430 (where agreement and declaration of trust made clear that only trustees could obligate plan, reliance by worker on statement by union representative was unreasonable). *See Galvez* v. *Local 804 Welfare Trust Fund*, 543 F. Supp. 316, 317 (E.D. N.Y. 1982) (union business agent has no authority to act for fund since ERISA mandates separation between union and pension funds); *Oates* v. *Teamster Affiliates Pension Plan*, 482 F. Supp. 481, 487-88 (D.D.C. 1979) (estoppel applicable where reliance on representations by union president was justified by fact that plan was financed and controlled by union).

The district court erred in comparing the level of knowledge of plaintiffs with that of the Kohn employees who were refused membership in the union. Our inquiry focuses on Kohn's knowledge since Kohn claims to have relied to its detriment by establishing alternative health and pension benefits for its employees. In the absence of reasonable reliance, the district court's determination that plaintiffs are estopped from seeking the delinquent contributions is clearly erroneous.

IV.

Plaintiffs also contest the district court's determination that Kohn was entitled to a credit for the contributions made to the Health and Welfare Fund in August for the employees terminated September 3. After terminating the employees, Kohn sought to apply the contributions to future obligations on behalf of its remaining union employees. The fund, through administrator Darrow, refused to provide a credit on the ground that the contributions were due since the employees remained on the Kohn payroll until September 3. The district court found that Kohn was entitled to a credit because "[n]o where in the [collective bargaining] agreement is it found that the employer is required to make contributions on behalf of employees who fail to work any day of the month."

Paragraph (1) of 29 U.S.C. § 1103(c) provides that:

> Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

Paragraph (2)(A)(ii) provides an exception to the general prohibition expressed in paragraph (1).

> In the case of a contribution . . . made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of Title 26 or the trust which is part of such plan is exempt from taxation under section 501(a) of Title 26), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

The statute places the determination as to whether a mistaken contribution was made in the hands of the benefit plan administrator.[6] *Peckham* v. *Board of Trustees of International Brotherhood of Painters and Allied Trades Union and Industry National Pension Fund*, 719 F.2d 1063, 1066, *modi-*

[6] Employers who pay mistaken contributions have no right of action or entitlement to a refund. *Kann* v. *Keystone Resources, Inc.*, 575 F. Supp. 1084, 1091 (W.D. Penn. 1983); *R. V. Cloud Co., Inc.* v. *Western Conference of Teamsters Pension Trust Fund*, 566 F. Supp. 1426, 1431 (N.D. Cal. 1983); *Hardy* v. *National Kinney of California, Inc.*, 565 F. Supp. 1027, 1030 n.1 (N.D. Cal. 1983); *Crown Cork and Seal Company, Inc.* v. *Teamsters Pension Fund of Philadelphia and Vicinity*, 549 F. Supp. 307, 311-12 (E.D. Penn. 1982), *aff'd*, 720 F.2d 661 (3d Cir. 1983); *Martin* v. *Keldorn, Inc.*, 546 F. Supp. 889, 894 (N.D. Ill. 1982). *Contra Ethridge* v. *Masonry Contractors, Inc.*, 536 F. Supp. 365, 368 (N.D. Ga. 1982); *E. M. Trucks, Inc.* v. *Central States*, 517 F. Supp. 1122, 1124 (D. Minn. 1981).

fied, 724 F.2d 100 (10th Cir. 1983); *Hardy* v. *National Kinney of California, Inc.*, 571 F. Supp. 1214, 1215 (N.D. Cal. 1983). "The trustees' action is conclusive unless arbitrary or capricious, not supported by substantial evidence, or erroneous on a question of law." *Peckham*, 719 F.2d at 1066. *See also Van Gunten*, 672 F.2d at 587. The district court does not appear to have followed this standard, but instead reviewed the administrator's decision *de novo*. However, under our deferential standard of review, the trustee's decision cannot be deemed arbitrary or without support.

The collective bargaining agreement provides only that contributions be made "for each employee covered by this Agreement." The Health and Welfare Fund Plan provides that "[t]he insurance of a covered person shall automatically terminate . . . [a]s of the last day of the insurance month in which the covered person ceases to be engaged in full-time active employment. . . ." The Health and Welfare Fund asserts that as long as the employees were on the payroll through September 3, they were covered by the plan, and, therefore, Kohn was obligated to contribute to the Fund for those employees. In the absence of a clear rule to the contrary, the trustee's decision that no mistaken contributions were made is not arbitrary or contrary to law. Therefore, Kohn was required to contribute for the employees terminated September 3 as well as those hired to replace them.

Finally, plaintiffs claim that the district court erred in refusing to enter judgment against Kohn for contributions owed as a result of the reinstatement in arbitration of three terminated employees. The district court declined to enter judgment until the appeals process was complete. The effect of the arbitration proceedings may be addressed by the district court in calculation of plaintiffs' damages.

Therefore, the judgment of the district court is REVERSED and REMANDED for further proceedings consistent with this opinion.

DOWD, J. Filed: 8/25/83

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Teamsters Local 348 Health and Welfare Fund, et al.	:	CASE NO. C82-2938A
Plaintiffs	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	:	
The Kohn Beverage Company	:	
Defendant	:	

This case was tried to the Court on March 10, 1983. Based upon the trial testimony and the exhibits introduced into evidence, the Court finds the following facts:

1. Jurisdiction of this Court is founded upon §301(a) of the Labor Management Relations Act of 1947, as amened 29 U.S.C. §185(a), §502 of the Employee Retirement Income Security Act

of 1974 (29 U.S.C. §1132, hereinafter referred to as ERISA) and §306 of the Multi Employer Pension Plan Amendments Act of 1980 (§515 ERISA) and 28 U.S.C. §1332.

2. The plaintiff, Teamsters Local 348 Health and Welfare Fund is a multi employer employee benefit plan within the meaning of §3(1), (2), (3), and (37), §502 and §515 of ERISA as amended by the Multi Employer Pension Plan Amendments Act of 1980 (29 U.S.C. §1002 (1), (2), (3) and (37), §1132 and §306, PL 96-364) and brings this action on behalf of the trustees, participants, and beneficiaries of said plan.

3. Plaintiff Central States Southeast and Southwest Areas Pension Fund is a Multi Employer Benefit Plan within the meaning of §3(1),(2),(3) and (37), §502 and §515 of ERISA as amended

by the Multi Employer Pension Plan Amendments Act of 1980 (29 U.S.C. §1002 (1), (2), (3), and (37), §1132 and §306, PL 96-364) and brings this action on behalf of the trustees, participants, and beneficiaries of said plan.

4. The Central States Southeast and Southwest Areas Pension Fund maintains offices and its principal place of business in a state other than the state of Ohio, to wit: 8550 West Bryn Mawr Avenue, in the City of Chicago, County of Cook, State of Illinois, and is a citizen of the state of Illinois.

5. Defendant, the Kohn Beverage Company (hereinafter Kohn) is a corporation organized and existing under the laws of the state of Ohio.

6. Defendant Kohn maintains offices and a place of business within

the state of Ohio, in the City of Akron, and is a citizen of the state of Ohio.

7. Defendant is engaged in the business of the transportation of goods in interstate commerce.

8. Defendant is an employer and a party in interest in an industry affecting commerce within the meaning of §3 (5), (11), (12), and (14) of ERISA, (29 U.S.C. §1002(5), (11), (12), and (14), §3 of the Multi Employer Pension Plan Amendment Acts of 1980 (PL-364) and the Labor Management Relations Acts of 1947 as amended (29 U.S.C. §151 et. seq.).

9. On February 20, 1981, Kohn Beverage and Teamsters Local 348 executed a collective bargaining agreement for the period June 1, 1980 until May 31, 1983, providing in pertinent part as follows:

"ARTICLE II: EMPLOYEES DEFINED-EXTENT OF BARGAINING UNIT

The term 'Employees', as used in this Agreement, shall include Driver-Salesmen, Special Drivers, Swing Drivers, Over-the-Road Drivers, Helpers and Warehousemen, Garage Mechanics and Garage Maintenance employees."

"ARTICLE VI: UNION SHOP CLAUSE

It shall be a condition of employment that all employees of the Employers covered by this Agreement, who are members of the Union in good standing by the payment of membership dues and those who are not members on the effective date of this Agreement, shall, on the thirty-first (31) day following the effective date of this Agreement, become and remain members in good standing in the Union by payment of membership dues. It shall also be a condition of employment that all employees covered by this agreement and hired on or after its effective date shall on the thirty-first (31) day following the beginning of such employment, become and remain members in good standing in the Union by payment of membership dues.

"ARTICLE XVII: PENSION

Effective June 1, 1980, the Employer shall contribute to

the Central States, Southeast and Southwest Areas Pension Fund the sum of Forty-six Dollars ($46.00) per week for each regular employee covered by this Agreement.

Effective June 1, 1981, the Employer shall increase said contribution to Fifty-one Dollars ($51.00) per week for each regular employee covered by this Agreement.

Effective June 1, 1982, the Employer shall continue to pay the sum of Fifty-one Dollars ($51.00) per week as contribution to said fund for each regular employee covered by this Agreement plus any increase in contributions as same are negotiated in the National Master Freight Agreement."

"ARTICLE XIV: HEALTH AND WELFARE

The Employers agree to contribute to the Teamsters Local No. 348 Health and Welfare Fund the following amounts for each employee covered by this Agreement:

Effective January 1, 1981, and January 1, 1982, and January 1, 1983, a sum not to exceed a maximum of ten percent (10%) increase in monthly contributions; it being understood that effective January 1, 1980, the sum of One Hundred Eighty-Five Dollars ($185.00) per month is the contribution figure which is

presently being made by the Employer to the Teamsters Local No. 348 Health and Welfare Fund for each individual affected employee.

The Employer shall continue to pay contributions for employees for a period of three (3) months if the employee is absent because of illness or off-the-job injury or layoff. The Employer shall continue to pay contributions for a period of six (6) months if the employee is absent because of an on-the-job injury.

The Employer shall remit all contributions by the 10th day of each month for that month. Late contributions shall be subject to a 10% late charge.

Benefits shall be covered in a booklet attached and shall be amended and updated from time to time subject to the provisions of the Trust Agreement and applicable law.

Retirees shall be covered by the Health and Welfare Program from age 57 to age 65.

The Employer further agrees to deduct, at the option of the employee, Ten Dollars ($10.00) per month for each employee for a supplemental policy to cover an additional Fifty Dollars ($50.00) benefit per week for sickness or accident (non-

occupational) plus Ten Thousand Dollars ($10,000.00) additional life insurance.

Regular part time employees shall be covered by Health and Welfare if they are not covered by another plan."

10. Article 106(a) of the Central States Southeast and Southwest Areas Pension Fund Plan, in effect July 1, 1980 to date, defines "employee" as follows:

"(a) A person (other than a person employed in a supervisory capacity) who has been on the payroll of an Employer for at least 30 days who is employed under the terms and conditions of a Collective Bargaining Agreement, as herinafter defined, entered into between an Employer, as herein defined, and a Union, as herein defined, and on whose behalf contributions are made or are presently required to be made to the Pension Fund by the Employer. . . "

11. Section 1.04 defines "employer" as follows:

"Section 1.04: Employer, as used herein, shall mean any Employer who is now, or shall in the future

be, bound by a Collective Bargaining Agreement, as hereinafter defined, with the Union, agrees to be bound by the Trust Agreement, satisfies the requirements for participation established by the Trustees, and is formally accepted for such participation by the Trustees. An Employer shall cease such participation upon determination by the Trustees that said Employer has failed to comply with any of these conditions or any such other conditions or requirements as may be set forth in the Trust Agreement or promulgated pursuant thereto."

12. Section 1.05 defines "union" as follows:

"Section 1.05: Union, as used herein, shall mean the Central Conference of Teamsters, the Southern Conference of Teamsters, and their affected affiliated local unions, and such other unions as the Trustees may agree upon."

13. Section 1.09 defines "collective bargaining agreement" as follows:

"Section 1.09: Collective Bargaining Agreement, as used herein, shall mean an agreement to which any Union, as defined

herein, is a party with an Employer, as defined herein."

Article I, Section 1 of the Trust Agreement defines "employer" as follows:

> "Employer - The term 'Employer' as used herein shall mean any employer who is bound by a collective bargaining agreement with the Union, or any employer not presently a party to such collective bargaining agreement who satisfies the requirements for participation as established by the Trustees and agrees to be bound by this Agreement."

Article I, Section 3(a) defines "employee" as follows:

> "(a) A person who is employed under the terms and conditions of a collective bargaining agreement entered into between an Employer as herein defined and a Union as herein defined, and on whose behalf payments are required by such collective bargaining agreement or applicable law to be made to the Fund by the Employer . . ."

14. Section 3.02(a) of the Plan defines "covered employment" as follows:

> "(a) Any employment of an Employee for which contributions to the Pension Fund are made or are

required to be made on his behalf shall be considered Covered Employment if such contributions are in accordance with the rules and regulations of this Plan and Trust Agreement."

15. Article I, Section 1, of the Amended and Restated Agreement and Declaration of Trust of the Teamsters Local No. 348 Health and Welfare Fund defines "Employer" as follows:

"SECTION 1 - EMPLOYER

The term "Employer" as used herein shall mean:

(a) Any individual, firm, association, partnership, or corporation who has duly executed and/or is bound by the Collective Bargaining Agreement with the Union and in accordance therewith agrees to participate in and contribute to the Trust Fund herein created and provided for. Any Employer who contributes to the Trust Fund created hereunder shall, by the act of contributing, become a party to this Agreement whether or not any such contributing Employer has signed this Agreement or a counterpart thereof.

(b) The Union to the extent, and

solely to the extent, that its acts in the capacity of an Employer of its Employees on whose behalf it makes contributions to the Trust Fund in accordance with the Collective Bargaining Agreement.

(c) The Trustees to the extent that they act in the capacity of an Employer of their Employees on whose behalf they make contributions to the Trust Fund in accordance with the Collective Bargaining Agreement.

(d) The Employers as defined herein shall, by the making of payments to the Trust Fund pursuant to the Collective Bargaining Agreement, be conclusively deemed to have accepted and be bound by this Agreement and Declaration of Trust."

16. Article I, Section 2, defines "Employees" as follows:

"SECTION 2 - EMPLOYEES

The term "Employees" as used herein shall mean and include members of a Collective Bargaining Unit represented by the Union who are eligible to participate in and receive the benefits of the Health and Welfare Plan and Trust in accordance with this Agreement. In addition, the term "Employees"

shall mean and include full-time, regular employees of Employers who are not members of said Collective Baragaing Unit of the Union, of the Union and of the Trustees. Self-employed individuals, pursuant to Section 401(c)(1) of the Internal Revenue Code, shall be considered employees. However, not to exceed 10% of the participants."

17. Article I, Section 3, defines "Union" as follows:

"SECTION 3 - UNION

The term "Union" as used herein shall mean Teamsters Local No. 348 and its successor."

18. Article I, Section 8, defines "Employer Contributions" as follows:

"SECTION 8 - EMPLOYER CONTRIBUTIONS

The term "Employer Contributions" as used herein shall mean payments made to the Trust Fund by an Employer."

19. Article I, Section 16, defines "Beneficiary" as follows:

"SECTION 16 - BENEFICIARY

The term "Beneficiary" shall mean a person designed by an Employee

or by the terms of the Health and Welfare Plan created pursuant to this Agreement, who is or may become entitled to receive a benefit."

20. Article II, Section 2, provides in part:

"SECTION 2 - EMPLOYER CONTRIBUTIONS TO FUND

Each Employer shall contribute and pay into the Fund the amount specified in accordance with the applicable Collective Bargaining Agreement entered into with the Union. . .Upon payment of contributions to the Trustees, all responsibilities of the Employer for each contribution shall cease, and the Employer shall have no responsibilities for the acts of the Trustees, nor shall an Employer be obligated to see to the application of any funds or property of the Trust or to see that the terms of the Trust have been complied with."

21. On September 1, 1981, approximately 29 employees of Kohn Beverage engaged in an unauthorized work stoppage. Subsequently, Kohn Beverage, after advising the subject employees

that if they did not return to work they would be fired, on September 2 and 3 proceeded with the termination of the aformentioned employees.

22. As a result of the strike, all but two of those employees were terminated on September 3, 1981.

23. Between September 3, 1981, and October 1, 1981, the defendant, Kohn Beverage Company hired a number of employees to replace the terminated employees. These new employees were hired as drivers, salesmen, warehousemen, and helpers, and in terms of wages, conditions, and hours of employment, were treated identically to their predecessors.

24. The defendant Kohn Beverage Company, has not not made any contributions to the Teamsters Local 348 Health and Welfare fund or the Central

States Southeast and Southwest Areas Pension Fund on behalf of any of the non-union replacements hired after September 1, 1981, to replace the discharged employees as described above.

25. The Defendant Kohn Beverage Company has continued to make payments to the Central States Pension Fund and the Teamsters Local Health and Welfare Program for the two employees who did not participate in the illegal work stoppage and were not terminated.

26. At the end of September, pursuant to the collective bargaining agreement, the new employees of Kohn attempted to join the local union. However, the employees were informed by Dan Darrow, Secretary Treasurer of Local 348, that the new employees would not be allowed to join the Local Union.

27. On October 15, 1981, several of the new employees of Kohn Beverage personally went to the Local 348 headquarters and met with Dan Darrow. At the meeting, the new employees were told by Dan Darrow that they would not be permitted to join the Union, that they would not be permitted to participate in the local Union's health and welfare program, nor in any of the benefits provided by Teamsters Local 348, including the Pension Program provided by the Central States Pension Fund.

28. In addition to being the Secretary Treasurer of the Teamsters Local 348, Dan Darrow is also a trustee and administrator of the Local 348 Health and Welfare Fund. Darrow has held the position of trustee with the Local Health and Welfare fund for a

period of twenty years. Additionally, Darrow held the position of administrator of the Local 348 health and welfare fund for approximately fifteen years.

29. As administrator of the fund, Darrow had the duty to supervise the running of the fund, the negotiating of the contribution rates within the contracts, collecting the funds, and supervising the payment of claims.

30. Dan Darrow is not an employee of Central States Southeast and Southwest Pension Funds. However, Mr. Darrow negotiated the Pension Plan into the collective bargaining agreement with Kohn Beverage, collected funds for the pension plan and assisted employees in their application for membership in the plan and provided information about the plan to local members. Additionally,

Dan Darrow, initiated suit on behalf of the Central States Southeast and Southwest Areas Pension Fund in the present action and is the only individual who ever dealt with Kohn Beverage on behalf of Central States.

31. After Mr. Darrow informed the employees on October 15, 1981, that they would not be permitted to participate in the Local Health and Welfare program nor the pension program provided by Central States, the employees returned to Kohn Beverage Company, and subsequently, Kohn Beverage provided for its new employees, a hospitalization and medical coverage plan with the Aetna Insurance Company, and also amended the Kohn Beverage Company Money Purchase Pension Plan and Trust to permit the participation in said Pension Plan by all employees of the Kohn Beverage Company.

32. The non-union replacement employees hired during the period September 3, 1981, to October 1, 1981 were not covered employees under the collective bargaining agreement, the participation agreement, the Central States Revised and Amended Trust Agreement, the Central States Plan, or the health and welfare declaration of trust.

33. Dan Darrow acted with apparent authority on behalf of both the Local 348 Health and Welfare Fund and Central States Southeast and Southwest Pension Fund.

34. The defendant, Kohn Beverge Company, took a credit for the payments it made to the Local Health and Welfare Fund for the month of September, for the employees it terminated on Septmber 3, 1981.

35. Three of the discharged employees were reinstated to their employment by an arbitrator's decision. The defendant, Kohn Beverage Company, filed suit to vacate those awards. At this time a court has confirmed the awards of the arbitrators, however, an appeal has been taken from the court's decision.

36. The plaintiffs have failed to exhaust administrative remedies as provided by the collective bargaining agreement.

CONCLUSIONS OF LAW

1. The collective bargaining agreement between the parties does not require the payment of funds to the Local Health and Welfare Fund or the Central States Pension Fund for employees who are not union members.

2. The plaintiffs, Teamsters Local 348 Health and Welfare Fund and the Central States Southeast Southwest Pension Fund are estopped from asserting an action to recover for the non payment of funds by the employer, Kohn Beverage.

3. The plaintiffs, Teamsters Local 348 Health and Welfare Fund and Central States Southeast and Southwest Areas Pension Fund are not entitled to recover payments allegedly due by the defendant Kohn Beverage Company for non-union employees hired subsequent to September 3, 1981.

4. The plaintiff Trustees of the Central States Southeast and Southwest Areas Pension Fund and the Local 348 Health and Welfare Fund are not required to exhaust administrative remedies set forth in the collective bargaining agreement. See Robbins v. Prosser's

Moving & Storage Co., 700 F. 2d 433 (8th Cir. 1983).

5. The defendant, Kohn Beverage Company, was entitled to take credit for the September payments made to the Local Health and Welfare Fund, on behalf of the employees who were terminated on September 3, 1981. No where in the agreement is it found that the employer is required to make contributions on behalf of employees who fail to work any day of the month. Although the employees had not yet been terminated, they were terminated on September 3, and failed to work any day in September.

6. As for the terminated employees whose arbitration proceedings are pending on appeal, the Court refrains from making any ruling as the state court proceedings have not yet been terminated and the Court does not

find it proper to enter a decision in regard to the pending state court actions.

MEMORANDUM OF OPINION

The plaintiff argues that the defendant, Kohn Beverage, is required to make payments to both the Local 348 Health and Welfare Fund and to the Central States Southeast and Southwest Areas Pension Fund for the non-union replacement employees hired subsequent to September 3, 1981. The plaintiffs argue that the definition of employee contained in the collective bargaining agreement, applicable to the parties, requires that payments be made on behalf of employees who are both union and non-union members, as job function rather than union membership is the test to determine whether or not an employee

is covered under the Pension and Health and Welfare Plans.

The defendant, Kohn Beverage, argues that the collective bargaining agreement applicable to the parties only requires that payments be made on behalf of employees who are also union members, and in that the replacement employees hired subsequent to September 3, 1981, were denied union membership payments are not required to the Local Health and Welfare Fund or the Central States Pension Fund on behalf of the non-union employees.

Article II of the collective bargaining agreement defines "employees" as driver salesmen, special drivers, swing drivers, over the road drivers, helpers, and warehousemen, garage mechanics and garage maintenance employees." There is no question that

the replacement employees hired subsequent to September 3, 1981 worked as driver salesmen, helpers and warehousemen as described in Article II of the collective bargaining agreement. The defendant, however, argues that Article VI of the Collective Bargaining Agreement, setting forth the union shop clause, requiring as a condition of employment that all employees of the employer covered by the agreement become members of the union within 30 days of being hired, further defines the term "employees" as requiring union membership.

The plaintiffs cite a number of cases in support of the proposition that an employer is required to make payments to health and welfare funds and pension funds for employees who are non-union members. See Audit Services, Inc. v.

Rolfson, 641 F. 2d 757 (9th Cir. 1981); Markt v. Ro-Mart, Inc., 471 F. Supp. 1292 (N.D. Cal. 1979); Manning v. Wiscombe, 498 F. 2d 1311 (10th Cir. 1974); Central States Southeast & Southwest Areas Pension Fund vs. Central Transport, Inc., 698 F. 2d 802 (6th Cir. 1983).

The Court notes that the above cases, cited by the plaintiff, were decided on the basis of the language contained in the collective bargaining agreements and trust agreements applicable to the parties. Accordingly, each case and the applicable agreements must be reviewed individually to determine the proper definition of "employee" as contemplated by the parties. Thus the Court must review the collective bargaining agreement and other relevant documents to determine

whether contributions are required to be made to the Local Health and Welfare Fund and the Central States Pension Plan on behalf of the non-union employees by Kohn Beverage.

Upon review of the cases cited by the plaintiff, the Court finds that the present case is distinguishable from the cases cited by the Plaintiff. In Audit Services, Inc., the trust agreement of the pension fund specifically stated that contributions were required whether an employee is "union, non-union, permanent or temporary." Thus, the trust agreement specifically included non-union members. In Markt v. Ro-Mart, the collective bargaining agreement required that payments be made on behalf of each and every employee. Furthermore, the trust agreement defined the term "employees" as "members of said

union and/or, employees who are eligible under Union rules and regulations for insurance or employees who perform, or any employer who is a party to the collective bargaining agreement with the union work which is under the jurisdiction of the union." In Manning, the Court found that the collective bargaining agreement recognized the union as the bargaining representative of all employees employed by the employer in a situation in which the employer employed large numbers of union and non-union employees.

In the present case, the collective bargaining agreement requires that all individuals become members of the union within 30 days after being hired. Additionally, the agreement does not require the employer to make contributions on behalf of employees to

the health and welfare and pension funds until after 30 days after hire. The contract requires as a condition of employment that all employees become members of the union. There is no clause either in the collective bargaining agreement or in the trust agreements which specifically identifies employees as including both union and non-union members.

Article 1.06(a) of the Central States Pension Plan indicates that contributions need not be made until at least 30 days have passed since the employee has been on the employer's payroll. Accordingly, the pension plan defines an employee as a person who has been on the payroll for at least 30 days. This is consistent with the fact that an employee may not become a member of the union until 30 days after he has been on

the payroll. In Markt, supra, at 1296, the Court noted that contributions were required to be made on behalf of employees at the time they were hired, indicating that both union and non-union employees were covered by the collective bargaining agreement

While the Court is aware of the decision in Markt, holding that the Union Shop Clause contained in the Collective Bargaining Agreement in that case did not add to the definition of the term "employee", the Court, upon reviewing the present agreement, finds that the Union Shop Clause further defines the term "employee" as contemplated by the parties and only requires that contributions be made to the Local Health and Welfare Fund and the Pension Plan on behalf of Union members.

Although the agreement defines "employees" in the terms of job description, the agreement further requires that all individuals become and remain union members. Obviously, this was also the view adopted by Dan Darrow, the individual who negotiated the clauses into the collective bargaining agreement, when he informed the new Kohn employees that they would not be entitled to any benefits pursuant to the collective bargaining agreement.

Accordingly, the Court finds that the collective bargaining agreement requires that the employer only need contribute for employees who are also union members.

The defendant additionally requests that this court find that the plaintiffs be estopped from asserting their claim to the unpaid contributions.

Upon review of the record, the Court finds that the plaintiffs' actions require that they be estopped from asserting a claim to the unpaid contributions.

At the time Dan Darrow informed the new employees of the Kohn Beverage Company that they would not be entitled to participate in either the Local Health and Welfare Fund or the Central States Pension Fund, he was acting with apparent authority on behalf of both the Local Health and Welfare Fund and the Central States Pension Fund.

Dan Darrow had been a trustee of the Local Health and Welfare Fund for a period of 20 years. Additionally, Darrow had been the administrator of the Local Health and Welfare Fund for approximately 15 years. Darrow had the duty to supervise the running of the

fund, the negotiating of the contribution rates with the contracts, collecting the funds, and supervising the payment of claims. See Rosen v. Hotel and Restaurant Emp., 637 F. 2d 592, 595 N.7 (3rd Cir. 1981).

As for the Central States Pension Fund, although Darrow was not a trustee or employee of the Pension Plan, he was the only person with whom Kohn Beverage had dealt with respect to the Plan. Mr. Darrow negotiated the pension plan into the collective bargaining agreement, collected funds for the pension plan and assisted employees in their application for membership in the plan and provided information about the plan to local members. Mr. Darrow identified himself as a liason between the employees and Central States (Tp. at 104). Additionally, Mr. Darrow also attempted

to initiate suit on behalf of the Central States Pension Plan in the present case, indicating his belief that he was acting as an agent of Central States.

The Court finds that Central States enabled and authorized Darrow to act on behalf of Central States to the extent that Kohn Beverage could reasonably interpret that Darrow was acting on behalf of Central States. Thus, although Darrow was not a trustee or employee of Central States, the defendant Central States clothed Darrow with sufficient authority to bind Central States on the basis of apparent authority.

Accordingly, the Court finds that Dan Darrow acted with apparent authority to bind both the Local Health and Welfare Fund and the Central States

Pension Fund, when he informed the new Kohn employees that they would not be eligible for benefits either under the Local Health and Welfare Fund or the Central States Pension Fund.

Four elements must be present in order to assert the doctrine of estoppel. These include:

> (1) The party to be estopped must be apprised of the facts; (2) the party to be estopped must have intended to impart a reasonable belief that reliance was expected; (3) the victim of the misrepresentation must be ignorant of the true facts; and (4) the victim must have relied to his detriment.

Thurber v. Western Conference of Teamsters Pension Plan, 542 F. 2d 1106, 1108 (9th Cir. 1976).

While the Court notes that a number of courts are hesitant to apply estoppel principles to cases involving benefit eligibility in certain circumstances, the Court finds that the

use of estoppel in the present case is justified. See Scheuer v. Central States Pension Fund, 358 F. Supp. 1332 (E.D. Wis. 1973).

In Rosen, supra, at 598, the court held:

> The sui generis nature of the pension agreement. . . should not immunize it from the equitable principles that govern similar agreements. The rising ethical standards in business relations which the estoppel doctrine is designed to enforce are no less needed in the administration of pension funds. . .

As Darrow was acting with apparent authority on behalf of both the Local Health and Welfare Fund and the Central States Pension Plan, knowledge of the particular facts in regards to the present action can be imparted to both.

Dan Darrow denied the new Kohn employees request to join the union and also informed them that they would not

be eligible for benefits pursuant to the Local Health and Welfare Fund or the Central States Pension Plan. Dan Darrow intended that his conduct be acted upon or at least could reasonably forsee action would be taken in reliance upon his refusal to allow the new Kohn employees to join the union or to join the Local Health and Welfare Fund or the Pension Plan. Upon the new Kohn Beverage employees return to the defendant Kohn Beverage Company, the defendant, faced with a rather unique and difficult situation, in reliance upon Dan Darrow's conduct, formed a new Health and Welfare Plan for the new Kohn employees and also a new Pension Plan. Kohn Beverage in reliance upon Darrow's assertions that the new employers would not be covered, and without knowledge otherwise, relied upon Darrow's

statements by creating and contributing to a new health welfare pension plans. In light of the Court's earlier determination that the contract does not require the payment of funds on behalf of non-union employees to the Local Health and Welfare Fund or the Central States Pension Plan, the employer, upon Dan Darrow's refusal to admit the new Kohn employees to either the Union, the Local Health and Welfare Fund or the Central States Pension Plan could not be held to know that the defendants were eligible to participate in such plans.

Accordingly, in light of the foregoing, the Court finds that the plaintiffs are estopped from asserting a claim to recover unpaid contributions.

The plaintiffs assert that the defendant, Kohn Beverage Company, was not entitled to a credit for the

September payments made to the funds on behalf of the employees who were subsequently terminated. Upon review of the evidence, the Court finds no clause requiring that payment is necessary for employees who are merely on the payroll on the first day of the month. The terminated employees in the present case failed to show up at work any day in September and were terminated on September 2, and 3, 1981.

Accordingly, the Court finds that the defendant is entitled to take a credit for the payments made on behalf of those individuals to the Local Health and Welfare fund and Pension Fund.

IT IS SO ORDERED.

David D. Dowd, Jr.
U.S. District Judge

84-1356

Office - Supreme Court, U.S.
FILED
MAR 28 1985
ALEXANDER L. STEVAS,
CLERK

CASE NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1985

THE KOHN BEVERAGE COMPANY

Petitioner

v.

TEAMSTERS LOCAL NO. 348, et al

Respondents

RESPONSE TO PETITIONER'S WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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RESPONSE TO QUESTIONS PRESENTED FOR REVIEW

I. The Court of Appeals correctly determined that the collective bargaining agreement between Kohn and Teamsters Local 348 required payment of contributions for all employees of the unit, irregardless of union membership.

II. The Court of Appeals correctly refused to apply estoppel principles against the Local 348 Health and Welfare Fund and the Central States Pension Fund because Kohn failed to establish the necessary and essential elements.

PARTIES:

Pursuant to Rule 34.1(b), Rules of the Supreme Court, the parties to this action are listed below:

Petitioner, The Kohn Beverage Company
1065 Jenkins Boulevard
Akron, OH 44306
(216) 724-1233

Respondents, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 348
272 West Market Street
Akron, OH 44303
(216) 693-5300

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OPINIONS BELOW

The opinion of the United States Sixth Circuit Court of Appeals is reported at 749 F.2d 315 and is found in Appendix "A" at p. 1 . The judgment of the United States District Court for the Northern District of Ohio was unpublished and is also in Appendix "A" at p. 12 .

JURISDICTION

The judgment of the United States Sixth Circuit Court of Appeals was entered on November 26, 1984. No petition for rehearing was filed.

STATEMENT OF THE CASE

On February 29, 1981, Kohn Beverage Company (Petitioner) and Teamsters Local 348 executed a collective bargaining agreement (Agreement). The Agreement required Petitioner to make contributions for each employee to the Teamsters Local 348 Health and Welfare Fund (Respondent) and Central States Southeast and Southwest Areas Pension Fund (Respondent). On September 1, 1981, 29 of Petitioner's employees staged a work stoppage, and on September 3, 27 employees were terminated and subsequently replaced by non-union employees.

When the non-union employees attempted to join the union pursuant to the union shop clause in the Agreement, they were denied membership by Local 348 Secretary-Treasurer, Dan Darrow. Darrow, who was trustee and

administrator of Respondent told the employees that they would not be eligible for benefits from the Health and Welfare or Pension Funds. Petitioner subsequently provided alternate health and pension benefits to the non-union employees.

On October 26, 1982, Respondent filed a complaint pursuant to the Labor Management Relations Act (LMRA). 29 USC §185(a) and the Employee Retirement and Income Security Act. 29 USC §§1132(a), 1145. Respondent alleged violation of the Agreement and failure by Petitioner to contribute to the employee benefit plans. Respondent sought to enjoin violations of the Agreement and benefit plans and to recover unpaid contributions, interest, costs and attorney fees.

After trial on March 10, 1983, the District Court filed findings of fact and conclusions of law granting judgment for Petitioner. The District Court held that Petitioner was not required to contribute

to the funds for non-union employees and, alternatively, Respondents were estopped by Darrow's statements to the new employees from recovering the delinquent contributions.

Respondent appealed to the Sixth Circuit Court of Appeals, which on November 26, 1984 issued an opinion reversing the District Court. The Sixth Circuit held that the Agreement applied to all employees of the bargaining unit, irregardless of union membership. The Court of Appeals ruled that the District Court erred in holding that the union shop clause alone limited Petitioner's obligation to make contributions on behalf of union members. In addition, the Sixth Circuit ruled that the District Court's factual findings relating to Petitioner's estoppel defense were clearly erroneous. The Appeals Court held that it is clear that Petitioner had not established the elements of estoppel.

It is the Decision of the Court of Appeals rendered on November 26, 1984 that

Petitioner presently seeks review through a Writ of Certiorari to the United States Supreme Court. Respondent maintains that the Writ must be denied because the Sixth Circuit's Decision does not present novel questions or involve issues that are in conflict among the Circuit Courts.

REASONS FOR DENYING PETITIONER'S WRIT OF CERTIORARI

I. THERE ARE NO NOVEL QUESTIONS CONCERNING COLLECTIVE BARGAINING AGREEMENTS AND LABOR RELATIONS.

Respondent's original action in District Court was based on the express provisions of an ordinary collective bargaining agreement. See Appendix "B" at p.1-3. The Agreement included a standard recognition clause (Art. I) and a typical union security provision (Art. VI). Article XIV required Petitioner to contribute to the Health and Welfare Fund "for each employee covered by this Agreement." Similarly, Article XVII required employer contributions to the Pension Fund "for each regular employee covered by this Agreement." Article II defined the Agreement's use of the term "Employee" to include the various job classifications within the unit.

The Sixth Circuit decided that, absent contrary language, collective bargaining agreements cover all employees of the bargaining unit. Under the Court's interpretation of the Agreement, Petitioner was required to make contributions to the Funds on behalf of all unit employees, not just union members. The Sixth Circuit's position embodies fundamental principles of labor relations and is well supported by case law, including Central States v. Central Transport, 698 F.2d 802 (6th Cir. 1983), cert. granted, ___U.S.___, 104 S.Ct. 3531 (1984).

A. COLLECTIVE BARGAINING PRINCIPLES REQUIRE THAT AGREEMENTS COVER ALL EMPLOYEES OF THE UNIT.

The LMRA grants unions the right to be selected as the exclusive representative of all employees in an appropriate unit for the purpose of collective bargaining. 29 USC §159(a). The exclusive representative has a duty to negotiate with the employer to reach an agreement that will benefit all unit employees. 29 USC §158(b(3). The union then has

a duty to administer the agreement in a fair manner on behalf of all the unit's employees. See Farmer v. ARA Services, 660 F.2d 1096 (6th Cir. 1981). The right of exclusive representation is a fundamental tenet of collective bargaining, the cornerstone of United States labor policy.

The National Labor Relations Board (Board) determines the scope of collective bargaining by designating the "unit appropriate for the purposes of collective bargaining." 29 USC §159(b). LMRA §9(b) requires that the Board determine the appropriate unit along the lines of either the employer unit, craft unit, plant unit or a subdivision thereunder. In making its determination, the Board is guided by the basic concept that only employees having a substantial mutuality of interest in wages, hours and working conditions can be appropriately grouped in a single unit. See Continental Baking Co., 99 NLRB 777, 30 LRRM 1119 (1952).

The defined unit is an important element in labor relations. It determines who votes for the exclusive representative and who is covered by the collective bargaining agreement.

The union's right to exclusively represent all the employees of a particular unit is commonly expressed in the agreement's recognition clause. Recognition clauses are included at the beginning of virtually all collective bargaining agreements. They establish the right and duty of the union to represent all employees of the unit. Recognition clauses reach all of the employees who perform work covered by an agreement. Manning v. Wiscombe, 498 F.2d 1131 (10th Cir. 1974).

These important collective bargaining concepts were considered by the Ninth Circuit in Audit Services, Inc. v. Rolfson, 641 F.2d 757 (9th Cir. 1981). Audit Services is strikingly similar to the case at bar.

Audit Services was a delinquent contributions case brought on behalf of certain union trust funds. Under the terms of a collective bargaining agreement, the employer was required to contribute for each employee covered by the agreement.

In Audit Services the Ninth Circuit affirmed the District Court, holding that the agreements unambiguously called for contributions to be made on behalf of all employees, both members and non-members of the union. To support its position the Circuit Court noted that the agreement in question contained a recognition clause where the employer acknowledged that the union was the exclusive bargaining representative for "all employees" covered by the agreement. The agreement then required the employer to contribute to the Health and Welfare Trust and the Pension Fund for "each compensated hour worked by each employee covered by this Agreement."

Certainly the Sixth Circuit was justified in deciding that the Agreement's coverage extended to all employees of the unit. That decision finds overwhelming support in the LMRA and in Board and case law. The agreement that the exclusive representative negotiates must apply with equal force to all unit employees, regardless of their membership in the union.

B. THE COVERAGE OF THE AGREEMENT AND ITS OBLIGATIONS THEREUNDER ARE NOT LIMITED BY UNION SECURITY CLAUSES.

The Exclusive representative always attempts to include a security clause in the agreement. Security clauses are important because they are a potential source of the union's financial and organizational strength. One kind of security device, the union shop, is specifically authorized by the LMRA. 29 USC §158(a)(3).

LMRA §8(a)(3) permits the employer to agree to a provision in a collective

bargaining agreement that requires employees to become union members after thirty (30) days of employment. Under a union shop provision the employee does not have to be a union member in order to be hired. However, he or she must become a union member after a probationary period in order to remain employed. LMRA §8(a)(3) has been interpreted to mean that employees cannot be terminated where union dues have been tendered, even though the employee otherwise declines to become affiliated with the union. NLRB v. Hershey Foods, 513 F.2d 1083 (9th Cir. 1975).

Hershey Foods springs from several rulings issued by this Court. The Supreme Court has recognized §8(a)(3) as a clear indication of Congress' approval of union security devices as tools to promote stability in labor relations. NLRB v. General Motors, 373 U.S. 734 (1963). In General

Motors, the Court held that the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. According to the General Motors Court, employment may be conditioned on union membership but in turn union membership may be conditioned only upon payment of fees and dues. As the Court noted in Radio Officers Union v. NLRB, 347 U.S. 17, 41 (1954), "membership as a condition of employment is whittled down to its financial core."

A union shop clause is a substantive provision. It describes the requirement that the employer is not to retain in its hire for more than thirty (30) days persons who do not become and remain members of the union. A union shop clause can not define or limit the parties' obligations to perform under the collective bargaining agreement. A union shop clause is present not to assist in interpreting the subsequent provisions

of the agreement, but to define the inter-relationship between the union, the employer, and the employees. Markt v. Ro-Mart, Inc., 471 F. Supp. 1292 (N.D. Cal. 1979).

In Markt the defendant employer had argued that the union shop clause defined the term "employee" as it was used throughout the balance of the agreement. According to the employer, the union shop provision effectively limited the term "employee" to include only members of the union. The District Court found that the union shop clause neither defines terms, nor limits the term "employee" to any meaning other than one who, under the agreement, performs work for compensation. Markt held that union shop clauses cannot affect other terms of a collective bargaining contract.

This principle is implicit in the Sixth Circuit's Decision where it held that to construe "employees" to mean union members would render the language of the union shop

clause as surplusage. The Circuit Court reviewed the language of the Agreement's union shop clause and took issue with how the District Court concluded that the term "employees" means "union member employees." According to the Sixth Circuit at p. 5:

> This construction effectively interprets the union shop clause to require union members to become union members, and renders the clause meaningless.

The Appeals Court concluded that the class of employees covered by the Agreement is not necessarily coincident with the class of union member employees.

The Sixth Circuit was justified in reversing the District Court's holding that the presence of the union shop clause alone limited Petitioner's obligation to make contributions on behalf of union members. That decision is supported in the case law and by this Court's interpretation of LMRA §8(a)(3). The parties' obligations under the Agreement are not defined or limited by the presence of a union security device.

II. THERE IS NO SPLIT OF AUTHORITY OVER THE APPLICATION OF ESTOPPEL PRINCIPLES AGAINST HEALTH AND WELFARE AND PENSION FUNDS.

Principles of estoppel have been applied against health and welfare and pension funds. See Rosen v. Hotel and Restaurant Employees, 637 F.2d 592 (3rd Cir. 1981); Scheuer v. Central States Pension Fund, 394 F.Supp. 193 (E.D. Wis. 1975) aff'd. 570 F.2d 347 (7th Cir. 1977); Hodgins v. Central States, 624 F.2d 760 (6th Cir. 1980). However, Petitioner maintains that the "vast majority of the Courts" have refused to apply estoppel principles against pension plans. To support this proposition, Petitioner points to a footnote found in Reiherzer v. Shannon, 581 F.2d 1266 (7th Cir. 1970). None of the Circuit Court cases that Petitioner refers to allude to "confusion and uncertaintly about whether and in what circumstances estoppel should be applied against health and welfare and pension funds."

A. NO CIRCUIT COURT HAS HELD THAT ESTOPPEL PRINCIPLES CANNOT BE APPLIED AGAINST FUNDS SEEKING DELINQUENT CONTRIBUTIONS.

Phillips v. Kennedy, 542 F.2d 52 (8th Cir. 1976) involved a suit contesting the disqualification of benefits allegedly due a widow under a pension plan. Estoppel principles were not applied in Phillips because the Court determined that the husband-participant had effectively fulfilled the plan's eligibility requirements. The Eighth Circuit held that the widow was entitled to benefits on that basis alone. In dictum, the Circuit Court cautioned that the actuarial soundness of pension plans may be too important to obligate the payment of benefits solely on the basis of misleading conduct. Phillips is hardly authority for the proposition that estoppel cannot be applied against health and welfare and pension funds.

Moglia v. Geoghegan, 403 F.2d 110 (2d Cir. 1968), cert. denied, 394 U.S. 919 (1969)

was also an action brought by a widow to compel payments from a pension fund. The Trust was funded by employer contributions but not on the basis of a collective bargaining agreement or any other written agreement. LMRA §302(c)(5)(B) prohibits payments from a union-employer trust fund unless there is a written agreement between the parties specifying the basis upon which the payments are made. 29 USC §186(c)(5)(B). The Funds invoked §302 as a defense but the widow argued that they should be estopped from denying benefits on that ground. In Moglia the Second Circuit refused to apply estoppel principles because estoppel could not provide the written agreement, the essential element. Moglia does not hold that estoppel cannot be applied against health and welfare and pension plans.

Thurber v. Western Conference of Teamsters Pension Plan, 542 F.2d 1106 (9th Cir. 1976) was a suit brought by an employee seeking benefits under an Employer-Employee

pension plan. In Thurber the plaintiff employee had permitted his union membership to lapse, thereby creating a break in service. The Circuit Court found that under the agreement, the employer was not required to make contributions for the purpose of "curing" breaks in service. The Ninth Circuit ruled that the pension fund could not legally require a retroactive contribution from the employer. Moreover, it would also be illegal for the fund to pay benefits to the plaintiff on the basis of illegal retroactive contributions. The Thurber Court did not hold that estoppel could not be applied against the pension fund. It held that the doctrine of estoppel cannot be invoked to compel an illegal act.

There is simply no authority supporting Petitioner's claim that the Courts of Appeal are split over whether estoppel principles can be applied against health and welfare and pension funds. All of Petitioner's citations involve suits seeking benefit payments from pension plans. None of the cases

involve delinquent contributions due under the express terms of a collective bargaining agreement. None of the cases involve health and welfare plans. Estoppel principles are applied against health and welfare and pension plans, if the requisite elements are fulfilled.

B. PETITIONER'S ESTOPPEL DEFENSE FAILED BECAUSE IT DID NOT ESTABLISH THE NECESSARY ELEMENTS.

The proper function of estoppel is to prevent fraud and to promote the ends of justice. Dickerson v. Colgrove, 100 U.S. 578 (1879). The party claiming an estoppel must show the conduct giving rise to the estoppel and its good faith reliance thereon. The claiming party must prove an ignorance of the real facts and that its injury was caused by the conduct of the other party. Crosset Lumber Co. v. United States, 87 F.2d 930 (8th Cir. 1937). The application of estoppel must depend upon the circumstances of each

particular case. Scott County v. Advance-Rumley Thresher Co., 288 F. 739 (8th Cir. 1923). Applying the essential elements of estoppel to this case, the Sixth Circuit properly rejected Petitioner's estoppel defense.

The Court of Appeals held that the estoppel defense failed because Petitioner had actual knowledge of the Agreement. Petitioner knew of its obligation to make contributions to the funds. This position is supported by Employer - Teamsters Joint Council No. 184 Health and Welfare Fund v. Weatherall Concrete, Inc., 468 F. Supp. 1167 (S.D.W.V. 1979). In Weatherall the Court refused to apply estoppel principles because it could not be said that the claiming party was without knowledge of the true facts.

Weatherall was an action seeking to recover deficient contributions to union trust funds. The Plaintiffs charged that contributions were being made, but not in

the amounts required by the collective bargaining agreement. The employer defended by invoking the doctrine of estoppel. The District Court rejected this defense because the employer had reason to know the exact amount due in contributions.

The Weatherall Court found that the employer had signed and received a copy of the collective bargaining agreement. The agreement set forth the rates at which the employer was to contribute to the fund. On this basis, the Court held that the employer had constructive, if not actual, knowledge that contributions were not being made in accordance with the agreement. With this knowledge the employer could not avail itself of the estoppel doctrine.

The Sixth Circuit also ruled that Petitioner could not maintain an estoppel defense because its "reliance" on Darrow's representations was not reasonable. The Circuit Court ruled that Petitioner had

means of determining the truth of Darrow's statements. Because Darrow was acting outside his authority, Petitioner could not reasonably rely on his statements to the non-union employees. The Court's finding is reasonable, especially in light of Knoll v. Phoenix Steel Corp., 465 F.2d 1128 (3rd Cir. 1972), cert. denied, 409 U.S. 1126 (1973).

In Knoll, several former employees of a closed plant filed suit seeking pension payments from the terminated Plan. The collective bargaining agreement contained a detailed provision outlining the Plan's termination procedure. The Pension Retirement Board was charged with supervising the termination. The employees' claim was based on a representation made to them by a union agent. The employees argued that the union was estopped from denying them benefits.

The Third Circuit found that the employees should have known that the

Retirement Board was vested with exclusive control of the Plan's disposition at termination. The Court ruled that the provision's fundamental aspect was its removal of the Plan's administration from union control. Board control was critical to the structure of the Plan as a whole. Knoll held that the employees could not reasonably rely upon the union official's statements.

In analyzing Petitioner's estoppel defense the Sixth Circuit did not "ignore" the findings of fact made by the District Court. The Appeals Court considered the findings of fact relating to Petitioner's estoppel defense. The Court determined that they were clearly erroneous.

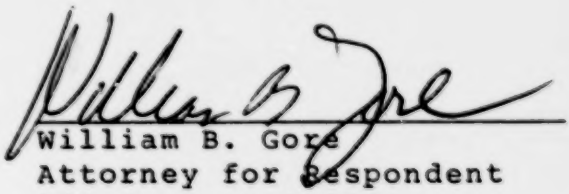
CONCLUSION

The Sixth Circuit's reasoning is based on fundamental principles of labor relations and is supported by the case law. The Court of Appeals decision does not raise important

or novel questions. It does not conflict with any decisions of the other Circuit Courts. For these reasons Petitioner's Writ of Certiorari must be denied.

Respectfully submitted,

LAYBOURNE, SMITH, OBERDANK, GORE & SHAPIRO



William B. Gore
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CERTIFICATE OF SERVICE

A copy of the foregoing has been forwarded by regular U.S. Mail this 22 day of March 1985 to Harry A. Tipping, Attorney for Petitioner, 300 Centran Building, Akron, Ohio 44308; and Bernard S. Goldfarb and Mark V. Webber, Attorneys for Respondent, Central States, 1800 55 Public Square, Cleveland, Ohio 44113.

William B. Gore
Attorney for Respondent

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

749 F.2d 315

Nos. 83-3663 & 83-3672

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TEAMSTER'S LOCAL 348 HEALTH AND WELFARE FUND, et al.

Plaintiffs-Appellants,

v.

KOHN BEVERAGE COMPANY,

Defendant-Appellee.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed November 26, 1984

Before: MARTIN and CONTIE, Circuit Judges; and PECK, Senior Circuit Judge.

CONTIE, Circuit Judge. Plaintiffs Teamster's Local 348 Health and Welfare Fund and Central States Southeast and Southwest Areas Pension Fund appeal a district court order granting judgment for defendant, Kohn Beverage Co., in this action brought pursuant to the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1381, and 29 U.S.C. § 185(a). We reverse.

I.

On February 20, 1981, Kohn and Teamster's Local 348 executed a collective bargaining agreement which provided that Kohn must contribute for each employee to the Teamster's Local 348 Health and Welfare Fund and Central States Southeast and Southwest Areas Pension Fund. On September 1, 1981, twenty-nine Kohn employees staged a work stoppage, and, on September 3, twenty-seven employees were terminated and subsequently replaced by non-union employees. Three discharged employees were reinstated after arbitration. When the non-union employees attempted to join the union pursuant to the union shop clause in the collective bargaining agreement, they were denied membership by Local 348 Secretary-Treasurer Dan Darrow. Darrow, who was trustee and administrator of the Health and Welfare Fund, told the employees that they would not be eligible for benefits from the Health and Welfare or Pension Funds. Kohn subsequently provided alternative health and pension benefits to the non-union employees.

On October 26, 1982, the Health and Welfare Fund filed a complaint pursuant to 29 U.S.C. §§ 185(a), 1132(a), 1145 alleging violation of the collective bargaining agreement and failure by Kohn to contribute to the employee benefit plans.[1] The plaintiffs sought to enjoin violations of the collective bargaining agreement and benefit plans and to recover unpaid contributions, interest, costs and attorney fees. After trial on March 10, 1983, the district court filed findings of fact and conclusions of law granting judgment for Kohn. The district court held that Kohn was not required to contribute to the funds for non-union employees and that, even if Kohn were required to contribute, plaintiffs were estopped by Darrow's

[1] Central States first learned it had been named a plaintiff in the case on January 4, 1983, and, after petitioning the court, filed an amended complaint on March 4, 1983, alleging essentially the same allegations as the original complaint.

statements to the new employees from recovering the delinquent contributions. Additionally, the district court held that Kohn was entitled to a credit for payments made to the Health and Welfare Fund in late August 1981 for the employees terminated September 3. Plaintiffs appeal.[2]

II.

Plaintiffs contend that the district court erred in construing the collective bargaining agreement and benefit plans to require Kohn to contribute to the plans for union members only. The construction of collective bargaining agreements and employee benefit plans is a question of law fully reviewable by this court. *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 698 F.2d 802, 805 (6th Cir. 1983), *cert. granted*, — U.S. —, 104 S. Ct.

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[2] The respective trust agreements define, by reference, Kohn's obligation to contribute to the trusts in terms of Kohn's obligations under the collective bargaining agreement. Therefore, the inquiry relative to both the LMRA claims and ERISA claims is identical, and jurisdiction is appropriately premised on 29 U.S.C. § 185(a). *See Laborers Health and Welfare Trust Fund* v. *Kaufman & Broad of Northern California*, 707 F.2d 412, 416 n.4 (9th Cir. 1983). The district court apparently made no determination as to whether plaintiffs properly brought this action "on behalf of their members," nor whether plaintiffs were "participants," "beneficiaries," or "fiduciaries" within the purview of 29 U.S.C. §§ 1002(7), (8), (21), 1132(a), (e). Whether plaintiffs properly state claims cognizable under ERISA was not raised by the parties and has no effect on our determination of issues raised in this appeal; therefore, we express no opinion as to whether plaintiffs properly state a claim pursuant to 29 U.S.C. § 1132(a). *See Pressroom Unions-Printers League Income Security Fund* v. *Continental Assurance Co.*, 700 F.2d 889 (2d Cir.), *cert. denied*, — U.S. —, 104 S. Ct. 148 (1983); *Local 807 Labor-Management Pension Fund* v. *Owens Trucking, Inc.*, 585 F. Supp. 616 (E.D. N.Y. 1984); *Sixty-Five Security Plan* v. *Blue Cross and Blue Shield of Greater New York*, 583 F. Supp. 380, 383 (S.D. N.Y. 1984); *Margaret Hall Foundation, Inc.* v. *Atlantic Financial Management, Inc.*, 572 F. Supp. 1475, 1485 (D. Mass. 1983); *Employees Savings Plan of Mobil Oil Corporation* v. *Vickery*, 99 F.R.D. 138, 140-41 (S.D. N.Y. 1983); *Rosenthal* v. *Ann Service Corp.*, 571 F. Supp. 1229, 1230 n.1 (S.D. N.Y. 1983); *Amalgamated Industrial Union Local 44-A Health and Welfare Fund* v. *Webb*, 562 F. Supp. 185 (N.D. Ill. 1983). However, *see Fentron Industries, Inc.* v. *National Shopmen Pension Fund*, 674 F.2d 1300, 1305 (9th Cir. 1982).

3531 (1984); *Mackey v. National Football League*, 543 F.2d 606, 612 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

The collective bargaining agreement required Kohn to contribute to the Health and Welfare Fund "for each employee covered by this Agreement," Article XIV, and to the Pension Fund "for each regular employee covered by this Agreement," Article XVII. Article II of the agreement provided that "[t]he term 'Employees', as used in this Agreement shall include Driver-Salesmen, Special Drivers, Swing Drivers, Over-the-Road Drivers, Helpers and Warehousemen, Garage Mechanics and Garage Maintenance employees." The agreement included a recognition clause and a union shop clause.[3]

Several factors guide a determination of the scope of coverage of a collective bargaining agreement. This court has construed a definition of employees by job classification to require coverage by the collective bargaining agreement of all employees within those classifications, regardless of union membership. *Central States* v. *Central Transport*, 698 F.2d at 804-05. The presence in the agreement of a recognition clause designating the union as the exclusive bargaining

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[3] Article I provided:

> The employer recognizes the Union as the sole and exclusive bargaining agent on behalf of all employees of the Employers, as hereinafter defined in Article II, with respect to wages, hours, and all other terms or conditions of employment.

Article VI provided:

> It shall be a condition of employment that all employees of the Employers covered by this Agreement, who are members of the Union in good standing on the effective date of this Agreement, shall remain members in good standing by the payment of membership dues and those who are not members on the effective date of this Agreement shall, on the thirty-first (31) day following the effective date of this Agreement, become and remain members in good standing in the Union by payment of membership dues. It shall also be a condition of employment that all employees covered by this Agreement and hired on or after its effective date shall on the thirty-first (31) day following the beginning of such employment, become and remain members in good standing in the Union by payment of membership dues.

agent for all employees indicates that fringe benefit contributions are required for both union and non-union members. *Audit Services, Inc.* v. *Rolfson*, 641 F.2d 757, 761 (9th Cir. 1981); *Manning* v. *Wiscombe*, 498 F.2d 1311, 1313 (10th Cir. 1974). The absence of language distinguishing union and non-union employees indicates that the agreement covers all employees. *Carpenters and Millwrights Health Benefit Trust Fund* v. *Gardineer Dry Walling Co.*, 573 F.2d 1172, 1177 (10th Cir. 1978). *See Cincinnati Bengals, Inc.* v. *Thompson*, 553 F. Supp. 1011, 1014 (S.D. Ohio 1983).

The district court based its interpretation of the agreement on the presence of the union shop clause. However, union shop clauses have been construed to require only payment of union dues and not union membership. *NLRB* v. *Hershey Foods Corp.*, 513 F.2d 1083, 1085-86 (9th Cir. 1975); *Markt* v. *Ro-Mart, Inc.*, 471 F. Supp. 1292, 1296 (N.D. Cal. 1979). *See NLRB* v. *Gold Standard Enterprises, Inc.*, 679 F.2d 673, 677 (7th Cir. 1982). *See also Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665 (1982). Further, to construe the term "employees" to mean union members would render the language of the union shop clause surplusage. The union shop clause required "that all employees covered by this agreement . . . become and remain members in good standing in the Union. . . ." This language suggests that "employees covered by this agreement" may exist prior to and apart from union-member employees. The district court interpreted the term "employees" to mean "union-member employees." This construction effectively interprets the union shop clause to require union members to become union members, and renders the clause meaningless. "A contract will not be construed so as to reject any words as surplusage if they reasonably can be given meaning." *Union Investment Company* v. *Fidelity & Deposit Company of Maryland*, 549 F.2d 1107, 1110 (6th Cir. 1977).

The district court erred in interpreting the agreement as applying only to union members. The agreement recognized

the union as the bargaining agent for all employees and defined the term "employees" by job classification and not union membership.[4] The agreement required contributions "for each employee covered by this agreement." The union shop clause indicates that the class of employees "covered by this agreement" is not necessarily coincident with the class of union-member employees. Further, the district court found that union and non-union members were treated identically in regard to wages, hours and conditions of employment. Accordingly, the district court erred in holding that the presence of the union shop clause alone limited Kohn's obligation to make contributions on behalf of union members.

III.

The district court held, alternatively, that plaintiffs were estopped from seeking payment of the delinquent contributions by Dan Darrow's refusal to allow the newly hired Kohn employees to join the union. Whether facts proven are legally sufficient to constitute an estoppel is a question of law fully reviewable by this court. *Prize Steak Products, Inc.* v. *Bally's Tom Foolery, Inc.*, 717 F.2d 367, 370 (7th Cir. 1983). However, because determinations concerning the specific elements of estoppel are questions of fact, *Shamrock Development Co.* v. *City of Concord*, 656 F.2d 1380, 1386 (9th Cir. 1981), the district court's factual findings must be upheld unless clearly erroneous.

Without deciding that estoppel is an available defense against employee benefit funds, it is clear that Kohn did not establish the elements of estoppel.[5] Estoppel requires

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[4] ERISA, consistent with our decision, provides that "[t]he term 'employee' means any individual employed by an employer." 29 U.S.C. § 1002(6).

[5] In actions arising under federal statutes, federal common law, rather than state law, controls with respect to the availability of

a representation, to a party without knowledge of the facts and without the means to ascertain them, upon which the party asserting the estoppel justifiably relies in good faith to his detriment. *See Johnson* v. *Williford*, 682 F.2d 868, 872 (9th Cir. 1982); *Junker* v. *Crory*, 650 F.2d 1349, 1357 (5th Cir. 1981); *NLRB* v. *J. D. Industrial Insulation Company, Inc.*, 615 F.2d 1289, 1294 (10th Cir. 1980); *Gibson* v. *International Harvester Co.*, 557 F. Supp. 1000, 1003 (W.D. Tenn. 1983); *Minnesota Mining and Manufacturing Company* v. *Blume*, 533 F. Supp. 493, 517 (S.D. Ohio 1978), *aff'd*, 684 F.2d 1166 (6th Cir. 1982), *cert. denied*, — U.S. —, 103 S. Ct. 1449 (1983).

The estoppel defense fails because Kohn had knowledge about the plans and its obligations thereunder, and did not reasonably rely on Darrow's representations. The reliance of a party seeking to assert estoppel must be reasonable. *Chambless* v. *Masters, Mates & Pilots Pension Plan*, 571 F. Supp. 1430, 1452 (S.D. N.Y. 1983). While it may be reasonable for an employee and union member to believe that a union representative has authority to act on behalf of the fund, *Scheuer* v. *Central States Pension Fund*, 394 F. Supp. 193, 196 (E.D. Wis. 1975), *aff'd*, 570 F.2d 347 (7th Cir. 1977), reliance by an employer, with knowledge of the plan, on the statements of a union representative is unreasonable. *Audit Services, Inc.* v. *Rolfson*, 641 F.2d at 762 (funds not estopped from seeking delinquent contributions where employer was not ignorant of his responsibilities under the collective bargaining agreement); *Martin* v. *Hamil*, 608 F.2d 725, 730 n.8 (7th Cir. 1979) (employer, fully aware of provisions of collective bargaining agree-

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the estoppel defense. *Audit Services, Inc.* v. *Rolfson*, 641 F.2d at 762; *Aitken* v. *IP & GCU-Employer Retirement Fund*, 604 F.2d 1261, 1264 (9th Cir. 1979). We have previously declined to decide whether estoppel may be asserted against a trustee where the estoppel argument was meritless. *Van Gunten* v. *Central States, Southeast and Southwest Areas Pension Fund*, 672 F.2d 586, 589 (6th Cir. 1982). We decline to express an opinion on an issue not necessary to disposition of the case before us.

ment, could not reasonably rely on contrary advice from union business agent); *Employer-Teamsters Joint Council No. 84, Health and Welfare Fund* v. *Weatherall Concrete, Inc.*, 468 F. Supp. 1167, 1170 (S.D. W. Va. 1979) (employer with possession of collective bargaining agreement and constructive knowledge of its terms is precluded from asserting estoppel as a defense to an action by the trustee).

Article IV, Section 4.2 of the Amended Agreement and Declaration of Trust of Teamster's Local 348 Health and Welfare Fund provided that "[t]he trustees shall have full authority to determine the requirements with which an individual must comply in order to be eligible for benefits and to determine all of the terms and conditions of eligibility of Employees for the purpose of this Trust. . . ." Likewise the Revised and Amended Trust Agreement for the Central States Pension Fund, Article II, Section 10 provided:

> No individual or person may act as agent for the Fund unless specifically authorized in writing by the Trustees. No Employee or Union nor any representative of any Employer or Union, in such capacity, is authorized to interpret the Plan, nor can any such person act as agent of the Trustees. Only the Board of Trustees, the Pension Payment Committee or the Pension Payment Appeals Committee are authorized to interpret the Plan within the scope of their respective authorities.

Kohn, as a party to these plans, knew or had a means of determining the truth of Darrow's statements. Further, because both plans indicate that Darrow was acting outside his authority, Kohn could not reasonably rely on Darrow's statements. *Knoll* v. *Phoenix Steel Corp.*, 465 F.2d 1128, 1132 (3d Cir. 1972), *cert. denied*, 409 U.S. 1126 (1973) (employees unreasonably relied on union official's statements about pension payments where authority to determine the use of pension fund rested solely with retirement board and where pension fund agreement provided that decision of the board would be

conclusive and binding); *Chambless* v. *Masters, Mates & Pilots Pension Plan*, 571 F. Supp. 1430 (where agreement and declaration of trust made clear that only trustees could obligate plan, reliance by worker on statement by union representative was unreasonable). *See Galvez* v. *Local 804 Welfare Trust Fund*, 543 F. Supp. 316, 317 (E.D. N.Y. 1982) (union business agent has no authority to act for fund since ERISA mandates separation between union and pension funds); *Oates* v. *Teamster Affiliates Pension Plan*, 482 F. Supp. 481, 487-88 (D.D.C. 1979) (estoppel applicable where reliance on representations by union president was justified by fact that plan was financed and controlled by union).

The district court erred in comparing the level of knowledge of plaintiffs with that of the Kohn employees who were refused membership in the union. Our inquiry focuses on Kohn's knowledge since Kohn claims to have relied to its detriment by establishing alternative health and pension benefits for its employees. In the absence of reasonable reliance, the district court's determination that plaintiffs are estopped from seeking the delinquent contributions is clearly erroneous.

IV.

Plaintiffs also contest the district court's determination that Kohn was entitled to a credit for the contributions made to the Health and Welfare Fund in August for the employees terminated September 3. After terminating the employees, Kohn sought to apply the contributions to future obligations on behalf of its remaining union employees. The fund, through administrator Darrow, refused to provide a credit on the ground that the contributions were due since the employees remained on the Kohn payroll until September 3. The district court found that Kohn was entitled to a credit because "[n]o where in the [collective bargaining] agreement is it found that the employer is required to make contributions on behalf of employees who fail to work any day of the month."

Paragraph (1) of 29 U.S.C. § 1103(c) provides that:

> Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

Paragraph (2)(A)(ii) provides an exception to the general prohibition expressed in paragraph (1).

> In the case of a contribution . . . made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of Title 26 or the trust which is part of such plan is exempt from taxation under section 501(a) of Title 26), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

The statute places the determination as to whether a mistaken contribution was made in the hands of the benefit plan administrator.[6] *Peckham* v. *Board of Trustees of International Brotherhood of Painters and Allied Trades Union and Industry National Pension Fund*, 719 F.2d 1063, 1066, *modi-*

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[6] Employers who pay mistaken contributions have no right of action or entitlement to a refund. *Kann* v. *Keystone Resources, Inc.*, 575 F. Supp. 1084, 1091 (W.D. Penn. 1983); *R. V. Cloud Co., Inc.* v. *Western Conference of Teamsters Pension Trust Fund*, 566 F. Supp. 1426, 1431 (N.D. Cal. 1983); *Hardy* v. *National Kinney of California, Inc.*, 565 F. Supp. 1027, 1030 n.1 (N.D. Cal. 1983); *Crown Cork and Seal Company, Inc.* v. *Teamsters Pension Fund of Philadelphia and Vicinity*, 549 F. Supp. 307, 311-12 (E.D. Penn. 1982), *aff'd*, 720 F.2d 661 (3d Cir. 1983); *Martin* v. *Keldorn, Inc.*, 546 F. Supp. 889, 894 (N.D. Ill. 1982). *Contra Ethridge* v. *Masonry Contractors, Inc.*, 536 F. Supp. 365, 368 (N.D. Ga. 1982); *E. M. Trucks, Inc.* v. *Central States*, 517 F. Supp. 1122, 1124 (D. Minn. 1981).

fied, 724 F.2d 100 (10th Cir. 1983); *Hardy* v. *National Kinney of California, Inc.*, 571 F. Supp. 1214, 1215 (N.D. Cal. 1983). "The trustees' action is conclusive unless arbitrary or capricious, not supported by substantial evidence, or erroneous on a question of law." *Peckham*, 719 F.2d at 1066. *See also Van Gunten*, 672 F.2d at 587. The district court does not appear to have followed this standard, but instead reviewed the administrator's decision *de novo*. However, under our deferential standard of review, the trustee's decision cannot be deemed arbitrary or without support.

The collective bargaining agreement provides only that contributions be made "for each employee covered by this Agreement." The Health and Welfare Fund Plan provides that "[t]he insurance of a covered person shall automatically terminate . . . [a]s of the last day of the insurance month in which the covered person ceases to be engaged in full-time active employment. . . ." The Health and Welfare Fund asserts that as long as the employees were on the payroll through September 3, they were covered by the plan, and, therefore, Kohn was obligated to contribute to the Fund for those employees. In the absence of a clear rule to the contrary, the trustee's decision that no mistaken contributions were made is not arbitrary or contrary to law. Therefore, Kohn was required to contribute for the employees terminated September 3 as well as those hired to replace them.

Finally, plaintiffs claim that the district court erred in refusing to enter judgment against Kohn for contributions owed as a result of the reinstatement in arbitration of three terminated employees. The district court declined to enter judgment until the appeals process was complete. The effect of the arbitration proceedings may be addressed by the district court in calculation of plaintiffs' damages.

Therefore, the judgment of the district court is REVERSED and REMANDED for further proceedings consistent with this opinion.

DOWD, J. Filed: 3/25/83

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Teamsters Local 348 Health and Welfare Fund, et al.	:	CASE NO. C82-2938A
Plaintiffs	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	:	
The Kohn Beverage Company	:	
Defendant	:	

This case was tried to the Court on March 10, 1983. Based upon the trial testimony and the exhibits introduced into evidence, the Court finds the following facts:

1. Jurisdiction of this Court is founded upon §301(a) of the Labor Management Relations Act of 1947, as amened 29 U.S.C. §185(a), §502 of the Employee Retirement Income Security Act

of 1974 (29 U.S.C. §1132, hereinafter referred to as ERISA) and §306 of the Multi Employer Pension Plan Amendments Act of 1980 (§515 ERISA) and 28 U.S.C. §1332.

2. The plaintiff, Teamsters Local 348 Health and Welfare Fund is a multi employer employee benefit plan within the meaning of §3(1), (2), (3), and (37), §502 and §515 of ERISA as amended by the Multi Employer Pension Plan Amendments Act of 1980 (29 U.S.C. §1002 (1), (2), (3) and (37), §1132 and §306, PL 96-364) and brings this action on behalf of the trustees, participants, and beneficiaries of said plan.

3. Plaintiff Central States Southeast and Southwest Areas Pension Fund is a Multi Employer Benefit Plan within the meaning of §3(1),(2),(3) and (37), §502 and §515 of ERISA as amended

by the Multi Employer Pension Plan Amendments Act of 1980 (29 U.S.C. §1002 (1), (2), (3), and (37), §1132 and §305, PL 96-364) and brings this action on behalf of the trustees, participants, and beneficiaries of said plan.

4. The Central States Southeast and Southwest Areas Pension Fund maintains offices and its principal place of business in a state other than the state of Ohio, to wit: 8550 West Bryn Mawr Avenue, in the City of Chicago, County of Cook, State of Illinois, and is a citizen of the state of Illinois.

5. Defendant, the Kohn Beverage Company (hereinafter Kohn) is a corporation organized and existing under the laws of the state of Ohio.

6. Defendant Kohn maintains offices and a place of business within

the state of Ohio, in the City of Akron, and is a citizen of the state of Ohio.

7. Defendant is engaged in the business of the transportation of goods in interstate commerce.

8. Defendant is an employer and a party in interest in an industry affecting commerce within the meaning of §3 (5), (11), (12), and (14) of ERISA, (29 U.S.C. §1002(5), (11), (12), and (14), §3 of the Multi Employer Pension Plan Amendment Acts of 1980 (PL-364) and the Labor Management Relations Acts of 1947 as amended (29 U.S.C. §151 et. seq.).

9. On February 20, 1981, Kohn Beverage and Teamsters Local 348 executed a collective bargaining agreement for the period June 1, 1980 until May 31, 1983, providing in pertinent part as follows:

"ARTICLE II: EMPLOYEES DEFINED-EXTENT OF BARGAINING UNIT

The term 'Employees', as used in this Agreement, shall include Driver-Salesmen, Special Drivers, Swing Drivers, Over-the-Road Drivers, Helpers and Warehousemen, Garage Mechanics and Garage Maintenance employees."

"ARTICLE VI: UNION SHOP CLAUSE

It shall be a condition of employment that all employees of the Employers covered by this Agreement, who are members of the Union in good standing by the payment of membership dues and those who are not members on the effective date of this Agreement, shall, on the thirty-first (31) day following the effective date of this Agreement, become and remain members in good standing in the Union by payment of membership dues. It shall also be a condition of employment that all employees covered by this agreement and hired on or after its effective date shall on the thirty-first (31) day following the beginning of such employment, become and remain members in good standing in the Union by payment of membership dues.

"ARTICLE XVII: PENSION

Effective June 1, 1980, the Employer shall contribute to

the Central States, Southeast and Southwest Areas Pension Fund the sum of Forty-six Dollars ($46.00) per week for each regular employee covered by this Agreement.

Effective June 1, 1981, the Employer shall increase said contribution to Fifty-one Dollars ($51.00) per week for each regular employee covered by this Agreement.

Effective June 1, 1982, the Employer shall continue to pay the sum of Fifty-one Dollars ($51.00) per week as contribution to said fund for each regular employee covered by this Agreement plus any increase in contributions as same are negotiated in the National Master Freight Agreement."

"ARTICLE XIV: HEALTH AND WELFARE

The Employers agree to contribute to the Teamsters Local No. 348 Health and Welfare Fund the following amounts for each employee covered by this Agreement:

Effective January 1, 1981, and January 1, 1982, and January 1, 1983, a sum not to exceed a maximum of ten percent (10%) increase in monthly contributions; it being understood that effective January 1, 1980, the sum of One Hundred Eighty-Five Dollars ($185.00) per month is the contribution figure which is

presently being made by the Employer to the Teamsters Local No. 348 Health and Welfare Fund for each individual affected employee.

The Employer shall continue to pay contributions for employees for a period of three (3) months if the employee is absent because of illness or off-the-job injury or layoff. The Employer shall continue to pay contributions for a period of six (6) months if the employee is absent because of an on-the-job injury.

The Employer shall remit all contributions by the 10th day of each month for that month. Late contributions shall be subject to a 10% late charge.

Benefits shall be covered in a booklet attached and shall be amended and updated from time to time subject to the provisions of the Trust Agreement and applicable law.

Retirees shall be covered by the Health and Welfare Program from age 57 to age 65.

The Employer further agrees to deduct, at the option of the employee, Ten Dollars ($10.00) per month for each employee for a supplemental policy to cover an additional Fifty Dollars ($50.00) benefit per week for sickness or accident (non-

occupational) plus Ten Thousand Dollars ($10,000.00) additional life insurance.

Regular part time employees shall be covered by Health and Welfare if they are not covered by another plan."

10. Article 106(a) of the Central States Southeast and Southwest Areas Pension Fund Plan, in effect July 1, 1980 to date, defines "employee" as follows:

"(a) A person (other than a person employed in a supervisory capacity) who has been on the payroll of an Employer for at least 30 days who is employed under the terms and conditions of a Collective Bargaining Agreement, as herinafter defined, entered into between an Employer, as herein defined, and a Union, as herein defined, and on whose behalf contributions are made or are presently required to be made to the Pension Fund by the Employer. . . "

11. Section 1.04 defines "employer" as follows:

"Section 1.04: Employer, as used herein, shall mean any Employer who is now, or shall in the fu-

be, bound by a Collective Bargaining Agreement, as hereinafter defined, with the Union, agrees to be bound by the Trust Agreement, satisfies the requirements for participation established by the Trustees, and is formally accepted for such participation by the Trustees. An Employer shall cease such participation upon determination by the Trustees that said Employer has failed to comply with any of these conditions or any such other conditions or requirements as may be set forth in the Trust Agreement or promulgated pursuant thereto."

12. Section 1.05 defines "union" as follows:

"Section 1.05: Union, as used herein, shall mean the Central Conference of Teamsters, the Southern Conference of Teamsters, and their affected affiliated local unions, and such other unions as the Trustees may agree upon."

13. Section 1.09 defines "collective bargaining agreement" as follows:

"Section 1.09: Collective Bargaining Agreement, as used herein, shall mean an agreement to which the Union, as defined

herein, is a party with an Employer, as defined herein."

Article I, Section 1 of the Trust Agreement defines "employer" as follows:

> "Employer - The term 'Employer' as used herein shall mean any employer who is bound by a collective bargaining agreement with the Union, or any employer not presently a party to such collective bargaining agreement who satisfies the requirements for participation as established by the Trustees and agrees to be bound by this Agreement."

Article I, Section 3(a) defines "employee" as follows:

> "(a) A person who is employed under the terms and conditions of a collective bargaining agreement entered into between an Employer as herein defined and a Union as herein defined, and on whose behalf payments are required by such collective bargaining agreement or applicable law to be made to the Fund by the Employer . . ."

14. Section 3.02(a) of the Plan defines "covered employment" as follows:

> "(a) Any employment of an Employee for which contributions to the Pension Fund are made or are

required to be made on his behalf shall be considered Covered Employment if such contributions are in accordance with the rules and regulations of this Plan and Trust Agreement."

15. Article I, Section 1, of the Amended and Restated Agreement and Declaration of Trust of the Teamsters Local No. 348 Health and Welfare Fund defines "Employer" as follows:

"SECTION 1 - EMPLOYER

The term "Employer" as used herein shall mean:

(a) Any individual, firm, association, partnership, or corporation who has duly executed and/or is bound by the Collective Bargaining Agreement with the Union and in accordance therewith agrees to participate in and contribute to the Trust Fund herein created and provided for. Any Employer who contributes to the Trust Fund created hereunder shall, by the act of contributing, become a party to this Agreement whether or not any such contributing Employer has signed this Agreement or a counterpart thereof.

(b) The Union to be entitled, but

solely to the extent, that its acts in the capacity of an Employer of its Employees on whose behalf it makes contributions to the Trust Fund in accordance with the Collective Bargaining Agreement.

(c) The Trustees to the extent that they act in the capacity of an Employer of their Employees on whose behalf they make contributions to the Trust Fund in accordance with the Collective Bargaining Agreement.

(d) The Employers as defined herein shall, by the making of payments to the Trust Fund pursuant to the Collective Bargaining Agreement, be conclusively deemed to have accepted and be bound by this Agreement and Declaration of Trust."

16. Article I, Section 2, defines "Employees" as follows:

"SECTION 2 - EMPLOYEES

The term "Employees" as used herein shall mean and include members of a Collective Bargaining Unit represented by the Union who are eligible to participate in and receive the benefits of the Health and Welfare Plan and Trust in accordance with this Agreement. In addition, the term "Employees"

shall mean and include full-time, regular employees of Employers who are not members of said Collective Baragaing Unit of the Union, of the Union and of the Trustees. Self-employed individuals, pursuant to Section 401(c)(1) of the Internal Revenue Code, shall be considered employees. However, not to exceed 10% of the participants."

17. Article I, Section 3, defines "Union" as follows:

"SECTION 3 - UNION

The term "Union" as used herein shall mean Teamsters Local No. 348 and its successor."

18. Article I, Section 8, defines "Employer Contributions" as follows:

"SECTION 8 - EMPLOYER CONTRIBUTIONS

The term "Employer Contributions" as used herein shall mean payments made to the Trust Fund by an Employer."

19. Article I, Section 16, defines "Beneficiary" as follows:

"SECTION 16 - BENEFICIARY

The term "Beneficiary" shall mean a person designated by an Employee

or by the terms of the Health and Welfare Plan created pursuant to this Agreement, who is or may become entitled to receive a benefit."

20. Article II, Section 2, provides in part:

"SECTION 2 - EMPLOYER CONTRIBUTIONS TO FUND

Each Employer shall contribute and pay into the Fund the amount specified in accordance with the applicable Collective Bargaining Agreement entered into with the Union. . .Upon payment of contributions to the Trustees, all responsibilities of the Employer for each contribution shall cease, and the Employer shall have no responsibilities for the acts of the Trustees, nor shall an Employer be obligated to see to the application of any funds or property of the Trust or to see that the terms of the Trust have been complied with."

21. On September 1, 1981, approximately 29 employees of Kohn Beverage engaged in an unauthorized work stoppage. Subsequently, Kohn Beverage, after advising the subject employees

that if they did not return to work they would be fired, on September 2 and 3 proceeded with the termination of the aformentioned employees.

22. As a result of the strike, all but two of those employees were terminated on September 3, 1981.

23. Between September 3, 1981, and October 1, 1981, the defendant, Kohn Beverage Company hired a number of employees to replace the terminated employees. These new employees were hired as drivers, salesmen, warehousemen, and helpers, and in terms of wages, conditions, and hours of employment, were treated identically to their predecessors.

24. The defendant Kohn Beverage Company, has not not made any contributions to the Teamsters Local 348 Health and Welfare fund or the Central

States Southeast and Southwest Areas Pension Fund on behalf of any of the non-union replacements hired after September 1, 1981, to replace the discharged employees as described above.

25. The Defendant Kohn Beverage Company has continued to make payments to the Central States Pension Fund and the Teamsters Local Health and Welfare Program for the two employees who did not participate in the illegal work stoppage and were not terminated.

26. At the end of September, pursuant to the collective bargaining agreement, the new employees of Kohn attempted to join the local union. However, the employees were informed by Dan Darrow, Secretary Treasurer of Local 348, that the new employees would not be allowed to join the Local Union.

27. On October 15, 1981, several of the new employees of Kohn Beverage personally went to the Local 348 headquarters and met with Dan Darrow. At the meeting, the new employees were told by Dan Darrow that they would not be permitted to join the Union, that they would not be permitted to participate in the local Union's health and welfare program, nor in any of the benefits provided by Teamsters Local 348, including the Pension Program provided by the Central States Pension Fund.

28. In addition to being the Secretary Treasurer of the Teamsters Local 348, Dan Darrow is also a trustee and administrator of the Local 348 Health and Welfare Fund. Darrow has held the position of trustee with the Local Health and Welfare fund for a

period of twenty years. Additionally, Darrow held the position of administrator of the Local 348 health and welfare fund for approximately fifteen years.

29. As administrator of the fund, Darrow had the duty to supervise the running of the fund, the negotiating of the contribution rates within the contracts, collecting the funds, and supervising the payment of claims.

30. Dan Darrow is not an employee of Central States Southeast and Southwest Pension Funds. However, Mr. Darrow negotiated the Pension Plan into the collective bargaining agreement with Kohn Beverage, collected funds for the pension plan and assisted employees in their application for membership in the plan and provided information about the plan to local members. Additionally,

Dan Darrow, initiated suit on behalf of the Central States Southeast and Southwest Areas Pension Fund in the present action and is the only individual who ever dealt with Kohn Beverage on behalf of Central States.

31. After Mr. Darrow informed the employees on October 15, 1981, that they would not be permitted to participate in the Local Health and Welfare program nor the pension program provided by Central States, the employees returned to Kohn Beverage Company, and subsequently, Kohn Beverage provided for its new employees, a hospitalization and medical coverage plan with the Aetna Insurance Company, and also amended the Kohn Beverage Company Money Purchase Pension Plan and Trust to permit the participation in said Pension Plan by all employees of the Kohn Beverage Company.

32. The non-union replacement employees hired during the period September 3, 1981, to October 1, 1981 were not covered employees under the collective bargaining agreement, the participation agreement, the Central States Revised and Amended Trust Agreement, the Central States Plan, or the health and welfare declaration of trust.

33. Dan Darrow acted with apparent authority on behalf of both the Local 348 Health and Welfare Fund and Central States Southeast and Southwest Pension Fund.

34. The defendant, Kohn Beverge Company, took a credit for the payments it made to the Local Health and Welfare Fund for the month of September, for the employees it terminated on Septmber 3, 1981.

35. Three of the discharged employees were reinstated to their employment by an arbitrator's decision. The defendant, Kohn Beverage Company, filed suit to vacate those awards. At this time a court has confirmed the awards of the arbitrators, however, an appeal has been taken from the court's decision.

36. The plaintiffs have failed to exhaust administrative remedies as provided by the collective bargaining agreement.

CONCLUSIONS OF LAW

1. The collective bargaining agreement between the parties does not require the payment of funds to the Local Health and Welfare Fund or the Central States Pension Fund for employees who are not union members.

2. The plaintiffs, Teamsters Local 348 Health and Welfare Fund and the Central States Southeast Southwest Pension Fund are estopped from asserting an action to recover for the non payment of funds by the employer, Kohn Beverage.

3. The plaintiffs, Teamsters Local 348 Health and Welfare Fund and Central States Southeast and Southwest Areas Pension Fund are not entitled to recover payments allegedly due by the defendant Kohn Beverage Company for non-union employees hired subsequent to September 3, 1981.

4. The plaintiff Trustees of the Central States Southeast and Southwest Areas Pension Fund and the Local 348 Health and Welfare Fund are not required to exhaust administrative remedies set forth in the collective bargaining agreement. See Robbins v. Prosser's

Moving & Storage Co., 700 F. 2d 433 (8th Cir. 1983).

5. The defendant, Kohn Beverage Company, was entitled to take credit for the September payments made to the Local Health and Welfare Fund, on behalf of the employees who were terminated on September 3, 1981. No where in the agreement is it found that the employer is required to make contributions on behalf of employees who fail to work any day of the month. Although the employees had not yet been terminated, they were terminated on September 3, and failed to work any day in September.

6. As for the terminated employees whose arbitration proceedings are pending on appeal, the Court refrains from making any ruling as the state court proceedings have not yet been terminated and the Court does not

find it proper to enter a decision in regard to the pending state court actions.

MEMORANDUM OF OPINION

The plaintiff argues that the defendant, Kohn Beverage, is required to make payments to both the Local 348 Health and Welfare Fund and to the Central States Southeast and Southwest Areas Pension Fund for the non-union replacement employees hired subsequent to September 3, 1981. The plaintiffs argue that the definition of employee contained in the collective bargaining agreement, applicable to the parties, requires that payments be made on behalf of employees who are both union and non-union members, as job function rather than union membership is the test to determine whether or not an employee

is covered under the Pension and Health and Welfare Plans.

The defendant, Kohn Beverage, argues that the collective bargaining agreement applicable to the parties only requires that payments be made on behalf of employees who are also union members, and in that the replacement employees hired subsequent to September 3, 1981, were denied union membership payments are not required to the Local Health and Welfare Fund or the Central States Pension Fund on behalf of the non-union employees.

Article II of the collective bargaining agreement defines "employees" as driver salesmen, special drivers, swing drivers, over the road drivers, helpers, and warehousemen, garage mechanics and garage maintenance employees." There is no question that

the replacement employees hired subsequent to September 3, 1981 worked as driver salesmen, helpers and warehousemen as described in Article II of the collective bargaining agreement. The defendant, however, argues that Article VI of the Collective Bargaining Agreement, setting forth the union shop clause, requiring as a condition of employment that all employees of the employer covered by the agreement become members of the union within 30 days of being hired, further defines the term "employees" as requiring union membership.

The plaintiffs cite a number of cases in support of the proposition that an employer is required to make payments to health and welfare funds and pension funds for employees who are non-union members. See Audit Services, Inc. v.

Rolfson, 641 F. 2d 757 (9th Cir. 1981); Markt v. Ro-Mart, Inc., 471 F. Supp. 1292 (N.D. Cal. 1979); Manning v. Wiscombe, 498 F. 2d 1311 (10th Cir. 1974); Central States Southeast & Southwest Areas Pension Fund vs. Central Transport, Inc., 698 F. 2d 802 (6th Cir. 1983).

The Court notes that the above cases, cited by the plaintiff, were decided on the basis of the language contained in the collective bargaining agreements and trust agreements applicable to the parties. Accordingly, each case and the applicable agreements must be reviewed individually to determine the proper definition of "employee" as contemplated by the parties. Thus the Court must review the collective bargaining agreement and other relevant documents to determine

whether contributions are required to be made to the Local Health and Welfare Fund and the Central States Pension Plan on behalf of the non-union employees by Kohn Beverage.

Upon review of the cases cited by the plaintiff, the Court finds that the present case is distinguishable from the cases cited by the Plaintiff. In Audit Services, Inc., the trust agreement of the pension fund specifically stated that contributions were required whether an employee is "union, non-union, permanent or temporary." Thus, the trust agreement specifically included non-union members. In Markt v. Ro-Mart, the collective bargaining agreement required that payments be made on behalf of each and every employee. Furthermore, the trust agreement defined the term "employees" as "members of said

union and/or, employees who are eligible under Union rules and regulations for insurance or employees who perform, or any employer who is a party to the collective bargaining agreement with the union work which is under the jurisdiction of the union." In Manning, the Court found that the collective bargaining agreement recognized the union as the bargaining representative of all employees employed by the employer in a situation in which the employer employed large numbers of union and non-union employees.

In the present case, the collective bargaining agreement requires that all individuals become members of the union within 30 days after being hired. Additionally, the agreement does not require the employer to make contributions on behalf of employees to

the health and welfare and pension funds until after 30 days after hire. The contract requires as a condition of employment that all employees become members of the union. There is no clause either in the collective bargaining agreement or in the trust agreements which specifically identifies employees as including both union and non-union members.

Article 1.06(a) of the Central States Pension Plan indicates that contributions need not be made until at least 30 days have passed since the employee has been on the employer's payroll. Accordingly, the pension plan defines an employee as a person who has been on the payroll for at least 30 days. This is consistent with the fact that an employee may not become a member of the union until 30 days after he has been on

the payroll. In Markt, supra, at 1296, the Court noted that contributions were required to be made on behalf of employees at the time they were hired, indicating that both union and non-union employees were covered by the collective bargaining agreement

While the Court is aware of the decision in Markt, holding that the Union Shop Clause contained in the Collective Bargaining Agreement in that case did not add to the definition of the term "employee", the Court, upon reviewing the present agreement, finds that the Union Shop Clause further defines the term "employee" as contemplated by the parties and only requires that contributions be made to the Local Health and Welfare Fund and the Pension Plan on behalf of Union members.

Although the agreement defines "employees" in the terms of job description, the agreement further requires that all individuals become and remain union members. Obviously, this was also the view adopted by Dan Darrow, the individual who negotiated the clauses into the collective bargaining agreement, when he informed the new Kohn employees that they would not be entitled to any benefits pursuant to the collective bargaining agreement.

Accordingly, the Court finds that the collective bargaining agreement requires that the employer only need contribute for employees who are also union members.

The defendant additionally requests that this court find that the plaintiffs be estopped from asserting their claim to the unpaid contributions.

Upon review of the record, the Court finds that the plaintiffs' actions require that they be estopped from asserting a claim to the unpaid contributions.

At the time Dan Darrow informed the new employees of the Kohn Beverage Company that they would not be entitled to participate in either the Local Health and Welfare Fund or the Central States Pension Fund, he was acting with apparent authority on behalf of both the Local Health and Welfare Fund and the Central States Pension Fund.

Dan Darrow had been a trustee of the Local Health and Welfare Fund for a period of 20 years. Additionally, Darrow had been the administrator of the Local Health and Welfare Fund for approximately 15 years. Darrow had the duty to supervise the running of the

fund, the negotiating of the contribution rates with the contracts, collecting the funds, and supervising the payment of claims. See Rosen v. Hotel and Restaurant Emp., 637 F. 2d 592, 595 N.7 (3rd Cir. 1981).

As for the Central States Pension Fund, although Darrow was not a trustee or employee of the Pension Plan, he was the only person with whom Kohn Beverage had dealt with respect to the Plan. Mr. Darrow negotiated the pension plan into the collective bargaining agreement, collected funds for the pension plan and assisted employees in their application for membership in the plan and provided information about the plan to local members. Mr. Darrow identified himself as a liason between the employees and Central States (Tp. at 104). Additionally, Mr. Darrow also attempted

to initiate suit on behalf of the Central States Pension Plan in the present case, indicating his belief that he was acting as an agent of Central States.

The Court finds that Central States enabled and authorized Darrow to act on behalf of Central States to the extent that Kohn Beverage could reasonably interpret that Darrow was acting on behalf of Central States. Thus, although Darrow was not a trustee or employee of Central States, the defendant Central States clothed Darrow with sufficient authority to bind Central States on the basis of apparent authority.

Accordingly, the Court finds that Dan Darrow acted with apparent authority to bind both the Local Health and Welfare Fund and the Central States

Pension Fund, when he informed the new Kohn employees that they would not be eligible for benefits either under the Local Health and Welfare Fund or the Central States Pension Fund.

Four elements must be present in order to assert the doctrine of estoppel. These include:

> (1) The party to be estopped must be apprised of the facts; (2) the party to be estopped must have intended to impart a reasonable belief that reliance was expected; (3) the victim of the misrepresentation must be ignorant of the true facts; and (4) the victim must have relied to his detriment.

Thurber v. Western Conference of Teamsters Pension Plan, 542 F. 2d 1106, 1108 (9th Cir. 1976).

While the Court notes that a number of courts are hesitant to apply estoppel principles to cases involving benefit eligibility in certain circumstances, the Court finds that the

use of estoppel in the present case is justified. See Scheuer v. Central States Pension Fund, 358 F. Supp. 1332 (E.D. Wis. 1973).

In Rosen, supra, at 598, the court held:

> The sui generis nature of the pension agreement. . . should not immunize it from the equitable principles that govern similar agreements. The rising ethical standards in business relations which the estoppel doctrine is designed to enforce are no less needed in the administration of pension funds. . .

As Darrow was acting with apparent authority on behalf of both the Local Health and Welfare Fund and the Central States Pension Plan, knowledge of the particular facts in regards to the present action can be imparted to both.

Dan Darrow denied the new Kohn employees request to join the union and also informed them that they would not

be eligible for benefits pursuant to the Local Health and Welfare Fund or the Central States Pension Plan. Dan Darrow intended that his conduct be acted upon or at least could reasonably forsee action would be taken in reliance upon his refusal to allow the new Kohn employees to join the union or to join the Local Health and Welfare Fund or the Pension Plan. Upon the new Kohn Beverage employees return to the defendant Kohn Beverage Company, the defendant, faced with a rather unique and difficult situation, in reliance upon Dan Darrow's conduct, formed a new Health and Welfare Plan for the new Kohn employees and also a new Pension Plan. Kohn Beverage in reliance upon Darrow's assertions that the new employers would not be covered, and without knowledge otherwise, relied upon Darrow's

statements by creating and contributing to a new health welfare pension plans. In light of the Court's earlier determination that the contract does not require the payment of funds on behalf of non-union employees to the Local Health and Welfare Fund or the Central States Pension Plan, the employer, upon Dan Darrow's refusal to admit the new Kohn employees to either the Union, the Local Health and Welfare Fund or the Central States Pension Plan could not be held to know that the defendants were eligible to participate in such plans.

Accordingly, in light of the foregoing, the Court finds that the plaintiffs are estopped from asserting a claim to recover unpaid contributions.

The plaintiffs assert that the defendant, Kohn Beverage Company, was not entitled to a credit for the

September payments made to the funds on behalf of the employees who were subsequently terminated. Upon review of the evidence, the Court finds no clause requiring that payment is necessary for employees who are merely on the payroll on the first day of the month. The terminated employees in the present case failed to show up at work any day in September and were terminated on September 2, and 3, 1981.

Accordingly, the Court finds that the defendant is entitled to take a credit for the payments made on behalf of those individuals to the Local Health and Welfare fund and Pension Fund.

IT IS SO ORDERED.

David D. Dowd, Jr.
U.S. District Judge

APPENDIX "B"

The Agreement executed February 20, 1981 provided, in part, as follows:

ARTICLE I: RECOGNITION

The employer recognizes the Union as the sole and exclusive bargaining agent on behalf of all employees of the employers, as hereinafter defined in Article II, with repect to wages, hours, and all other terms or conditions of employment.

ARTICLE II: EMPLOYEES DEFINED-EXTENT OF BARGAINING UNIT

The term "employees", as used in this Agreement, shall include Driver-Salesmen, Special Drivers, Swing Drivers, Over-the-Road Drivers, Helpers and Warehousemen, Garage Mechanics and Garage Maintenance employees.

ARTICLE VI: UNION SHOP CLAUSE

It shall be a condition of employment that all employees of the employers covered by this Agreement, who are members of the Union in good standing on the effective date of this Agreement, shall remain members in good standing by the payment of membership dues and those who are not members on the effective date of this Agreement shall, on the thirty-first (31st) day following the effective date of this Agreement, become and remain members in good standing in the Union by payment of membership dues. It

shall also be a condition of employment that all employees covered by this Agreement and hired on or after its effective date shall on the thirty-first (31st) day following the beginning of such employment, become and remain members in good standing in the Union by payment of membership dues.

ARTICLE XIV: HEALTH AND WELFARE

The employers agree to contribute to the Teamsters Local No. 348 Health and Welfare Fund the following amounts for each employee covered by this Agreement:

Effective January 1, 1981 and January 1, 1982 and January 1, 1983, a sum not to exceed a maximum of ten percent (10%) increase in monthly contributions; it being understood that effective January 1, 1980, the sum of One Hundred Eighty-Five Dollars ($185.00) per month is the contribution figure which is presently being made by the employer to the Teamsters Local No. 348 Health and Welfare Fund for each individual affected employee.

The employer shall continue to pay contributions for employees for a period of three (3) months if the employee is absent because of illness or off-the-job injury or layoff. The employer shall continue to pay contributions for a period of six (6) months if the employee is absent because of an on-the-job injury.

The employer shall remit all contributions by the 10th day of each month for that month. Late contributions shall be subject to a ten percent (10%) late charge . . .

ARTICLE XVII: PENSION

Effective June 1, 1980, the employer shall contribute to the Central States, Southeast and Southwest Areas Pension Fund the sum of Forty-Six Dollars ($46.00) per week for each regular employee covered by this Agreement.

Effective June 1, 1981, the employer shall increase said contribution to Fifty-One Dollars ($51.00) per week for each regular employee covered by this Agreement.

Effective June 1, 1982, the employer shall continue to pay the sum of Fifty-One Dollars ($51.00) per week as contribution to said fund for each regular employee covered by this Agreement plus any increase in contributions as same are negotiated in the National Freight Agreement.

Office-Supreme Court, U.S.
FILED
MAR 25 1985
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-1356

In the Supreme Court of the United States

October Term, 1984

THE KOHN BEVERAGE COMPANY,
Petitioner,

vs.

TEAMSTER'S LOCAL 348 HEALTH AND WELFARE FUND, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The Court of Appeals correctly determined that a collective bargaining agreement which required contributions to the Central States Southeast and Southwest Areas Pension Fund on behalf of both union and non-union personnel when the agreement contained a recognition clause making the union the collective bargaining agent for all employees regardless of union membership, when the agreement defined employees by job function, and when a "union shop" clause did not modify the definition of "employee."

2. The Court of Appeals correctly refused to apply estoppel principles against the trustees of a multi-employer pension plan to excuse contributions to the plan where an independent union official, over whom the pension fund trustees had no control, made unauthorized statements pertaining to pension coverage to employees of a contributing employer, and where the employer did not reasonably rely upon those statements, having available the plan documents which defined the terms of contributions and which expressly limited the fund's agents to those authorized in writing by the trustees to act in their behalf.

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No. 84-1356

In the Supreme Court of the United States

October Term, 1984

THE KOHN BEVERAGE COMPANY,
Petitioner,

vs.

TEAMSTER'S LOCAL 348 HEALTH AND WELFARE FUND, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Central States Southeast and Southwest Areas Pension Fund through counsel respectfully prays that the Petition for Writ of Certiorari be denied.

OPINIONS BELOW

This case arose from the decision of the Sixth Circuit Court of Appeals in *Teamster's Local 348 Health and Welfare Fund, et al. v. Kohn Beverage Company*, 749 F.2d 315 (1984), which reversed the unpublished opinion of August 25, 1983, in *Teamster's Local 348 Health and Wel-*

fare Fund, et al. v. The Kohn Beverage Company, Case No. C82-2938A (N.D. Ohio Aug. 25, 1983).

STATUTORY PROVISIONS INVOLVED

Employee Retirement Income Security Act of 1974 §502(a), (d), (e), (f), (g)(2), 29 U.S.C. §1132(a), (d), (e), (f), (g)(2)

Civil Enforcement

Persons empowered to bring civil action

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title.

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

Status of employee benefit plan as entity

(d) (1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

Jurisdiction

(e) (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this

subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

Amount in controversy; citizenship of parties

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

Attorney's fees and costs

(g) (2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 1145 of this Title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted

under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

Multiemployer Pension Plan Amendments Act of 1980 §306, ERISA §515, 29 U.S.C. §1145

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsisent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Labor-Management Relations Act §301(a), 29 U.S.C. §185(a)

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Judicial Code and Judiciary, 28 U.S.C. §1332(a)

Diversity of Citizenship; Amount in Controversy; Costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Labor-Management Relations Act §8(a), 29 U.S.C. §158(a)

Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

COUNTERSTATEMENT OF THE CASE

On January 4, 1983, plaintiff Central States Southeast and Southwest Areas Pension Fund, 8550 West Bryn Mawr Avenue, Chicago, Illinois (hereinafter "Pension Fund"), first discovered that it had been named a co-plaintiff with Teamster's Local 348 Health and Welfare Fund in a pending delinquent contribution case against Kohn Beverage Company. The Pension Fund had not authorized any such litigation and immediately retained its present counsel to represent it. *See* Affidavit of George Psaras filed January 10, 1983, in motion to dismiss (Docket Item 31) (Appendix, page 48). The Pension Fund filed its own amended complaint on March 4, 1983, and participated in the trial of March 10-11, 1983.

On August 28, 1983, the district court entered its findings of fact and conclusions of law, memorandum of opinion and judgment entry, in which it held in favor of defendant as against both plaintiffs. As to the Pension Fund, the court held that contributions to the Pension Fund were not owing upon replacement, non-union personnel working under a collective bargaining agreement with union personnnel, despite its finding that the wages, conditions, and hours of employment were identical for non-union and union personnel, and despite the finding that the replacements performed the same job func-

tions as their union predecessors. The non-union personnel had replaced union personnel discharged as a result of an unauthorized work stoppage. The court further held that the Pension Fund had clothed a union representative with apparent authority to act on its behalf despite a total absence of any such evidence in the record and, further, that the Pension Fund was estopped to claim contributions because of alleged unauthorized statements by the union representative, over whom it had no control, that non-union, replacement employees would not receive coverage under the Pension Fund plan.

On September 22, 1983, the Pension Fund filed a timely notice of appeal to the Sixth Circuit Court of Appeals (hereinafter "Court of Appeals"), which reversed the trial court after determining that the trial court's findings as to the coverage of the collective bargaining agreement and as to the employment of estoppel principles against the Pension Fund were clearly erroneous. *Teamster's Local 348 Health and Welfare Fund, et al. v. Kohn Beverage Co.*, 749 F.2d 315 (6th Cir. 1984). The Court of Appeals held that the collective bargaining agreement required contributions to the Pension Fund for both union and nonunion personnel working under its terms and that estoppel principles were unavailable against the Pension Fund to an employer which did not reasonably rely upon the unauthorized statements of a union official who had no authority to speak for the Pension Fund in the face of written plan documents limiting agency to those authorized by the Pension Fund Trustees to act in their behalf.

Factual Background

Jurisdiction of the trial court was founded upon §301(a) of the Labor-Management Relations Act of 1947, as amended (29 U.S.C. §185(a)), §502 of the Employee Retirement Income Security Act of 1974 (hereinafter referred to as "ERISA") (29 U.S.C. §1132), and §306 of the Multiemployer Pension Plan Amendments Act of 1980 (29 U.S.C. §1145), and 28 U.S.C. §1332 (Diversity of Citizenship).

Respondent Pension Fund is a multiemployer employee benefit plan within the meaning of §3(1), (2), (3), and (37), §502 and §515 of ERISA, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (29 U.S.C. §1002(1), (2), (3), and (37), §1132 and 29 U.S.C. §1145), and brought this action on behalf of the Trustees, participants, and beneficiaries of said Plan.

The Pension Fund maintains offices and its principal place of business in a state other than the State of Ohio, to-wit: 8550 West Bryn Mawr Avenue, in the City of Chicago, County of Cook, State of Illinois, and is a citizen of the State of Illinois (Stipulation Fact 4; Appendix, page 58). Petitioner, The Kohn Beverage Company (hereinafter "Kohn"), is a corporation organized and existing under the laws of the State of Ohio. Petitioner Kohn maintained offices and a place of business within the State of Ohio, in the City of Akron, State of Ohio, and is a citizen of the State of Ohio. Petitioner was engaged in the business of the transportation of goods in interstate commerce (Stipulation Fact 1, 2; Appendix, page 58).

Petitioner is an employer and a party in interest in an industry affecting commerce within the meaning of

§3(5), (11), (12), and (14) of ERISA (29 U.S.C. §1002(5), (11), (12), and (14)), §306 of the Multiemployer Pension Plan Amendments Act of 1980 (29 U.S.C. §1145), and the Labor Management Relations Act of 1947, as amended (29 U.S.C. §151 *et seq.*).

On or about June 1, 1977, petitioner Kohn executed with Teamster's Local 348 a participation agreement in the Pension Fund. Kohn was a participating employer in the Fund. On February 20, 1981, Kohn and Teamster's Local 348 executed a collective bargaining agreement for the period June 1, 1980, until May 31, 1983, providing in pertinent part as follows (Stipulation Fact 3; Appendix, page 58):

> ARTICLE I: UNION RECOGNITION
>
> The Employer recognizes the Union as the sole and exclusive bargaining agent on behalf of all employees of the Employers, as hereinafter defined in Article II, with respect to wages, hours, and all other terms or conditions of employment.
>
> ARTICLE II: EMPLOYEES DEFINED-EXTENT OF BARGAINING UNIT
>
> The term "Employees", as used in this Agreement, shall include Driver-Salesmen, Special Drivers, Swing Drivers, Over-the-Road Drivers, Helpers and Warehousemen, Garage Mechanics and Garage Maintenance employees.
>
> ARTICLE VI: UNION SHOP CLAUSE
>
> It shall be a condition of employment that all employees of the Employers covered by this Agreement, who are members of the Union in good standing on the effective date of this Agreement, shall remain

members in good standing by the payment of membership dues and those who are not members on the effective date of this Agreement shall, on the thirty-first (31) day following the effective date of this Agreement, become and remain members in good standing in the Union by payment of membership dues. It shall also be a condition of employment that all employees covered by this Agreement and hired on or after its effective date shall on the thirty-first (31) day following the beginning of such employment, become and remain members in good standing in the Union by payment of membership dues.

ARTICLE XVII: PENSION

Effective June 1, 1980, the Employer shall contribute to the Central States, Southeast and Southwest Areas Pension Fund the sum of Forty-six Dollars ($46.00) per week for each regular employee covered by this Agreement.

Effective June 1, 1981, the Employer shall increase said contribution to Fifty-one Dollars ($51.00) per week for each regular employee covered by this Agreement.

Effective June 1, 1982, the Employer shall continue to pay the sum of Fifty-one Dollars ($51.00) per week as contribution to said fund for each regular employee covered by this Agreement plus any increase in contributions as same are negotiated in the National Master Freight Agreement.

(Appendix, pages 66, 67, 73).

Section 1.06(a) of the Central States Southeast and Southwest Areas Pension Fund Plan, in effect July 1, 1980, to date, defines "employee" as follows:

(a) A person (other than a person employed in a supervisory capacity) who has been on the payroll of an Employer for at least 30 days who is employed under the terms and conditions of a Collective Bargaining Agreement, as hereinafter defined, entered into between an Employer, as herein defined, and a Union, as herein defined, and on whose behalf contributions are made or are presently required to be made to the Pension Fund by the Employer. . . .

Section 1.04 defines "employer" as follows:

Section 1.04: Employer, as used herein, shall mean any Employer who is now, or shall in the future be, bound by a Collective Bargaining Agreement, as hereinafter defined, with the Union, agrees to be bound by the Trust Agreement, satisfies the requirements for participation established by the Trustees, and is formally accepted for such participation by the Trustees. An Employer shall cease such participation upon determination by the Trustees that said Employer has failed to comply with any of these conditions or any such other conditions or requirements as may be set forth in the Trust Agreement or promulgated pursuant thereto.

Section 1.05 defines "union" as follows:

Section 1.05: Union, as used herein, shall mean the Central Conference of Teamsters, the Southern Conference of Teamsters, and their affected affiliated local unions, and such other unions as the Trustees may agree upon.

(Appendix, page 328).

Article I, Section 1 of the Revised and Amended Trust Agreements of the Pension Fund have similar definitions of "employee," "employer," and "union." *See* CS Exhibits 3, 4 and 6 (Appendix, pages 217, 238, 259).

Section 1.09 of the Plan defines "collective bargaining agreement" as follows:

> Section 1.09: Collective Bargaining Agreement, as used herein, shall mean an agreement to which any Union, as defined herein, is a party with an Employer, as defined herein.

(CS Exhibit 7; Appendix, page 329).

On September 1, 1981, approximately twenty-nine employees of Kohn allegedly engaged in an unauthorized work stoppage. Subsequently, all but two (2) employees were terminated from their job by the employer as a result of their alleged participation in said unauthorized work stoppage. All twenty-nine discharged employees were employees under the following classifications, as described in Article II of the collective bargaining agreement between the parties (CS Exhibit 2): driver-salesmen, helpers, warehousemen, garage mechanics, over-the-road drivers (Stipulation Fact 15-18; Appendix, page 60).

After September 3, 1981, Kohn hired replacements for the discharged employees, which replacements worked as driver-salesmen, helpers and warehousemen, as described in Article II of the collective bargaining agreement. As of February 24, 1983, Kohn had twenty-four employees, twenty-two of whom were replacements for the discharged employees and two of whom were not discharged because they did not participate in the "wildcat strike" of September 1981. The twenty-two replacements did not become members of Local 348. The two other employees

were members of Local 348 prior to September 1, 1981, and continued to be members of Local Union 348 (Stipulation Fact 19, 18, 20; Appendix, page 61).

Kohn recognized an obligation to pay contributions to the Pension Fund for the two union employees from September 1, 1981, pursuant to Article XVII of the collective bargaining agreement (Stipulation Fact 21).

All of the "non-discharged" employees had been on the Kohn payroll at least 32 days (Record, page 5; Appendix, page 445). Kohn did not notify the Pension Fund that it had hired replacements for the discharged employees by filling out "Employee, Billing Changes and Corrections Forms." Kohn recognized that it was the employer's obligation to notify the Pension Fund of the names and employment histories of additional employees working under the collective bargaining agreement. *See* Record, pages 280-281. Kohn did not make any contributions to the Pension Fund on behalf of any of the non-union replacements hired after September 1, 1981, to replace the discharged employees (Transcript, page 26; Stipulation Fact 22; Appendix, pages 449 and 61).

Except for non-payment of union dues and non-payment of health and welfare and pension contributions to Teamster's Local 348 Health and Welfare Plan and the Pension Fund, Kohn has treated the wages, conditions, and hours of employment of the non-union replacements identically to those of the discharged employees and the two remaining union employees of Kohn (Transcript, page 25; Appendix, page 445). These wages, conditions, and hours of employment are described in the collective bargaining agreement (Appendix, pages 176-208). Discharged employees Douglas, Brannon, and Byrd were reinstated

pursuant to arbitration decisions, but the company did not pay the Pension Fund the contributions owed on their behalf (Appendix, pages 450-451, 395, 409, 423).

REASONS WHY THE WRIT SHOULD BE DENIED

SUMMARY

Supreme Court review of this case is unwarranted. The Court of Appeals merely upheld the well settled principle of labor contract construction that collective bargaining agreements which define covered employees by job function cover both union and non-union personnel despite the provision of a union shop clause, which does not modify the definition of the word "employee," and which therefore does not require an employee to join the union. Furthermore, conditioning payment of contributions or benefits solely on the basis of union membership violates Section 8(a) of the LMRA.

Additionally, although the vast majority of courts have rejected the application of estoppel principles against the trustees of multiemployer pension plans, this Court need not even reach the estoppel issue because the Court of Appeals correctly determined that the employer had not reasonably relied upon purported unauthorized statements as to pension coverage of a union official over whom the Pension Fund had no control. This was particularly true in view of the existence of plan documents which defined coverage and which limited agency status to those persons authorized in writing by the Pension Fund Trustees to act on their behalf.

Furthermore, petitioner has demonstrated no conflict between circuits on the estoppel issue insofar as the two cases relied principally upon by petitioner are inapposite

to the Pension Fund case. *Rosen v. Hotel and Restaurant Employees & Bartenders Union*, 637 F.2d 592 (3d Cir. 1981), pertained to the "extraordinary circumstance" of detrimental reliance upon the statements of a *trustee* of a fund, a situation not present against the Pension Fund. *Scheuer v. Central States Pension Fund*, 394 F. Supp. 193 (E.D. Wis. 1975), *aff'd*, 570 F.2d 347 (7th Cir. 1977), has been implicitly sapped of its authority by a subsequent decision in the same circuit disavowing the *Scheuer* principles. *See Reiherzer v. Shannon*, 581 F.2d 1266 (7th Cir. 1978).

ARGUMENT

I. The Court of Appeals Correctly Determined That the Collective Bargaining Agreement Herein Required Contributions to the Pension Fund for Both Union and Non-Union Personnel Within the Same Job Classifications.

Article II of the collective bargaining agreement defines "employees" as "Driver Salesmen, Special Drivers, Swing Drivers, Over-the-Road Drivers, Helpers and Warehousemen, Garage Mechanics and Garage Maintenance employees." Union membership was not a part of the definition. All that was required was that one perform certain functions under the collective bargaining agreement. Without question, the non-union "replacement" employees hired after the "wildcat" strike in September 1981 performed the exact functions under the collective bargaining agreement as their predecessors, as driver-salesmen, helpers, and warehousemen. The evidence on this issue was uncontradicted.

The parties stipulated that "after September 3, 1981, Kohn hired replacements for the discharged employees, which replacements worked as driver salesmen, helpers, and warehousemen as described in Article II of the collective bargaining agreement." Still further, Mrs. Diehl, Vice-President of petitioner, testified at page 25 of the transcript that except for non-payment of pension and health and welfare benefits to the Pension Fund and Local 348 Health and Welfare Plan, and union dues, petitioner treated the wages, conditions, and hours of employment of the replacements identically to those of their union predecessors[1] (Appendix, page 24). Clearly, therefore, the job classifications of the replacement driver-salesmen, helpers, and warehousemen demonstrate that the non-union replacements were covered employees under the collective bargaining agreement. The non-union employees were in the same bargaining unit as the union employees.

The Central States Plan does not require union membership for an employee to qualify for benefits. It defines "employee" as a non-supervisory person who has been on the payroll for at least thirty days under the terms of the collective bargaining agreement between a union and an employer. *See* Plan Section 1.06(a) (Appendix, page 325). *See also* Trust Agreement Article I, Section 1 (CS Exhibit 6; Appendix, page 259).

The Sixth Circuit Court of Appeals correctly reaffirmed its prior position that job classification and not union

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1. The trial court correctly found as much as Finding of Fact No. 23, which provides as follows:

> Between September 3, 1981, and October 1, 1981, the defendant, Kohn Beverage Company, hired a number of employees to replace the terminated employees. These new employees were hired as drivers, salesmen, warehousemen, and helpers, and in terms of wages, conditions and hours of employment, were treated identically to their predecessors.

membership controls coverage of the collective bargaining agreement. *See Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 698 F.2d 802 (6th Cir. 1983), *cert. granted*, ... U.S. ....., 104 S. Ct. 3531 (1984). In this case the Court of Appeals held in accordance with an abundance of precedent that the recognition clause of the collective bargaining agreements makes the union the collective bargaining representative for all employees, both union and non-union. The union shop clause does not require union membership and indicates that employees may exist under the agreement apart from union-member employees.

To hold otherwise would render the union shop clause meaningless as requiring union members to become union members! Abundant precedent supported the position of the Court of Appeals. *See Audit Services, Inc. v. Rolfson*, 641 F.2d 757 (9th Cir. 1981); *Manning v. Wiscombe*, 498 F.2d 1311 (10th Cir. 1974); *Carpenters and Millwrights Health Benefit Trust v. Gardineer Dry Walling Co.*, 573 F. 2d 1172 (10th Cir. 1978); *NLRB v. Hershey Foods Corp.*, 513 F.2d 1083 (9th Cir. 1975); *Markt v. Ro-Mart, Inc.*, 471 F. Supp. 1292 (N.D. Cal. 1979).

In the face of this avalanche of precedent, petitioner has not presented a single case, other than the overturned district court decision herein, which supports its restrictive view of the coverage of a collective bargaining agreement. Furthermore, to adopt that view is to violate Section 8(a) of the LMRA. Under that section, abundant precedent demonstrates that conditioning payment of contributions or benefits solely on the basis of union membership violates Section 8(a) of the LMRA. *See Dura Corp. v. NLRB*, 380 F.2d 970 (6th Cir. 1967); *Kroger Co. v. NLRB*, 401 F.2d 682 (6th Cir. 1968); *Mathew v. Burns*,

Inc., 205 Misc. 1006, 129 N.Y.S. 841 (1954); *Pennello v. Mine Workers*, 88 F. Supp. 935 (D.D.C. 1950); *Jandel Furs*, 100 N.L.R.B. 1390, 30 L.R.R.M. 1463 (NLRB 1952); *Trust Fund Services v. Glasscar, Inc.*, 19 Wash. App. 736, 98 L.R.R.M. 2656 (Wash. Ct. App. 1978). These fundamental principles of labor contract interpretation are so well established that this Court need not exercise its supervisory powers to pass upon basic principles not subject to challenge.

II. This Court Should Not Address the Estoppel Issue Where Petitioner Failed to Prove the Essential Element of Reasonable Reliance, Where Abundant Precedent Disfavors Use of Estoppel Principles Against the Trustees of Multiemployer Plans, and Where There Is No Conflict in the Circuits on the Use of Estoppel Principles on the Facts of This Case.

Petitioner further seeks to invoke the use of estoppel principles although the Court of Appeals correctly determined that petitioner had not reasonably relied upon the unauthorized statements of a union official as to coverage under the Central States Plan in the face of plan documents which explained that he had no authority to act on behalf of the Pension Fund. Furthermore, the official allegedly made his statements to employees of petitioner and not to petitioner itself. Petitioner then tried to use these statements to excuse contributions to the Pension Fund.

The Court of Appeals correctly determined that on those facts, it did not even have to reach the estoppel issue on the merits, as it had declined to rule on that issue previously in *Hodgins v. Central States Southeast and Southwest Areas Pension Fund*, 624 F.2d 760 (6th

Cir. 1980). Similarly, review by this Court of the estoppel issue is unwarranted in a factual context where petitioner failed to prove the necessary element of reasonable reliance.

Furthermore, the vast majority of courts have refused to bind such trustees to the statements of such officials. In another Central States case, *Reiherzer v. Shannon*, 581 F.2d at 1267 n.1, the Seventh Circuit Court of Appeals held:

> We have serious doubts, however, as to the advisability of employing estoppel principles in determining whether an individual will receive benefits from an employer-funded union pension plan. The vast majority of courts considering this issue have rejected the use of estoppel principles in cases of this sort. *Thurber v. Western Conference of Teamsters' Pension Plan*, 542 F.2d 1106, 1108-09 (9th Cir. 1976) (per curiam); *Phillips v. Kennedy*, 542 F.2d 52, 55 n.8 (8th Cir. 1976) (dictum); *Moglia v. Geoghegan*, 403 F.2d 110, 117-18 (2d Cir. 1968), *cert. denied*, 394 U.S. 919, 89 S.Ct. 1193, 22 L.Ed.2d 453 (1969); *Chamberlain v. Bakery Confectionary Union & Industry International Pension Fund*, No. C-76-784-CBR (N.D. Cal. October 3, 1977); *Hodgens v. Central States Southeast & Southwest Areas Pension Fund*, 94 L.R.R.M. 2507 (E.D. Mich. 1976); *Melang v. I.B.E.W. Pacific Coast Pension Fund*, 93 L.R.R.M. 2389 (W.D. Wash. 1976); *Dohrer v. Wakeman*, 14 Wash. App. 157, 539 P.2d 91 (1975). *But see Scheuer v. Central States Pension Fund*, 358 F. Supp. 1332 (E.D. Wis. 1973).

Scheuer, however, has been implicitly sapped of its authority by *Reiherzer*, a subsequent decision within the Seventh Circuit, which disavowed the *Scheuer* estoppel holding. *Reiherzer*, 581 F.2d at 1267 n.1. *Accord Galvez*

v. Local 804 Welfare Trust Fund, 543 F. Supp. 316 (E.D. N.Y. 1982). Furthermore, in *Scheuer*, in an unpublished opinion, the Seventh Circuit affirmed the district court's finding that the plaintiff was not an independent contractor. Because of the affirmance, the Seventh Circuit found it unnecessary to consider the district court's estoppel finding. Because the decision is unpublished, plaintiff cannot attach a copy of the opinion to his brief pursuant to Seventh Circuit Rule 35. A copy of the caption is attached to this brief as Appendix Exhibit "A." The Seventh Circuit has rejected *Scheuer* in *Reiherzer*, as has the Eighth Circuit in *Phillips v. Kennedy*.

In *Thurber*, the Ninth Circuit Court of Appeals held that misrepresentations of the Administrator of the Fund could not estop the plan trustees. There, plaintiff Thurber relied upon representations of an employee of the firm retained to administer the trust fund. The court, however, considered the rights of the other pensioners and held that the trust fund could not be so deflated by the statements of the administrator. *See also Aitken v. IP&GCU-Employer Retirement Fund*, 604 F.2d 1261 (9th Cir. 1979), where the Ninth Circuit Court of Appeals followed its decision in *Thurber* and again rejected estoppel arguments against fund trustees. *Aitken*, 604 F.2d at 1267. *See also Blinkhorn v. McCarthy*, 332 A.2d 43 (1974), finding estoppel not valid against plan trustees. If estoppel arguments cannot apply to an administrator employed by a fund, they certainly cannot apply to the actions of an independent union official over whom the fund has no control.

In *Phillips v. Kennedy*, the Eighth Circuit opined that "[t]he actuarial soundness of pension funds is, absent extraordinary circumstances, too important to permit trustees to obligate the fund to pay pensions to persons

not entitled to them under the express terms of the pension plan." 542 F.2d at 55 n.8.

In *Yglesias v. United Paperworkers Pension Fund*, 2 EBC 1851 (E.D. N.Y. 1981), the district court held that a retiree could not base his claim for increased pension benefits on a union president's misstatements since the pension fund was a separate entity from the union. The court held that pension fund trustees must discharge their duties in accordance with plan documents under ERISA Section 404(a)(1)(D). *See also Hiebel v. Pension Fund, Central States, Southeast and Southwest Areas*, 96 CCH Lab. Cas. ¶14,137 (W.D. Mich. 1982); *Dohrer v. Wakeman*, 14 Wash. App. 157, 539 P.2d 91 (1975); *Miracle v. U M W Welfare Fund*, 373 F. Supp. 603 (D.D.C. 1974); and *Shaw v. Northwest Truck Repair, Inc.*, 91 L.R.R.M. 2051 (Ore. Sup. Ct. 1975).

In *Hiebel*, the court concluded that the "local union is a separate entity and is quite distinct from the pension plan. The defendant pension plan should not be held responsible for the assurances of people over whom it has no control." 96 CCH Lab. Cas. at 23,917.

Finally, the petitioner has demonstrated no conflict in the circuit courts of appeal on the salient estoppel issues. Acknowledging that most courts refuse to apply estoppel principles against the trustees of multiemployer plans, the petitioner relies upon *Rosen* and *Scheuer* to suggest an alleged conflict. In fact, no such conflict exists regarding the pension fund. *Rosen* agreed with the basic principle disfavoring the use of estoppel principles against fund trustees absent "extraordinary circumstances." There the court found such an extraordinary circumstance where a fund trustee had misled a participant by direct statements to the participant. In contrast here, a union official over

whom the Pension Fund had no control made statements to employees of petitioner, which statements petitioner extracted second hand from the employees. No court of appeals decision binds pension fund trustees to the statements of third persons over whom they have no control. Furthermore, the *Scheuer* decision has been essentially invalidated by the subsequent decision in *Reiherzer*.

CONCLUSION

The Court of Appeals' determination is wholly consistent with well-established principles of interpretation of collective bargaining agreements. It is equally in accordance with the decisions of other appellate courts which find that estoppel principles should not be utilized against the trustees of multiemployer pension plans. Therefore, respondent Central States, Southeast and Southwest Areas Pension Fund respectfully submits that the Petition for a Writ of Certiorari should be denied or the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX EXHIBIT "A"

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Heard October 27, 1977

December 9, 1977

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILSON COWEN, Senior Judge*

HOWARD N. SCHEUER, Plaintiff-Appellee, vs. CENTRAL STATES PENSION FUND, Defendant-Appellant.	)	Appeal from the United States District Court for the Eastern District of Wisconsin. No. 69-C-636

No. 77-1051